

No. 11794

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JOSHUA HENDY CORPORATION, a corporation,
Appellant,

vs.

LOUISE E. MILLS, Administratrix of the Estate of
Thomas C. Mills, Deceased,
Appellee.

LOUISE E. MILLS, Administratrix of the Estate of
Thomas C. Mills, Deceased,
Appellant,

vs.

JOSHUA HENDY CORPORATION, a corporation,
Appellee.

TRANSCRIPT OF RECORD

Upon Appeals From the District Court of the United States
for the Southern District of California
Central Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS:

For Appellant:

THELEN, MARRIN, JOHNSON & BRIDGES,
SAMUEL S. GILL
ROBERT H. SANDERS

Room 1004, 215 West Sixth Street
Los Angeles 14, California.

For Appellee:

WEINSTEIN & BERTRAM
PERRY BERTRAM

1151 South Broadway
Los Angeles 15, California. [1*]

In the District Court of the United States in and for
Southern District of California

Central Division

No. 5870-M

LOUISE E. MILLS, Administratrix of the Estate of
Thomas C. Mills, Deceased,

Plaintiff,

vs.

CALIFORNIA SHIPBUILDING CORPORATION,
a corporation,

Defendant.

COMPLAINT FOR WAGES AND LIQUIDATED
DAMAGES DUE UNDER THE FAIR LABOR
STANDARDS ACT OF 1938

Plaintiff complains and alleges:

I.

Plaintiff brings this action pursuant to Sec. 16(b) of the Fair Labor Standards Act of 1938 (Public No. 718, 75th Cong., Ch. 676, 52 Stat. 1060-1069 (1938), 29 U. S. C., Sec. 201-219), hereinafter referred to as the Act to recover overtime wages, liquidated damages and attorneys' fees.

II.

Jurisdiction of this action is conferred upon the Court by Sec. 16(b) of the Act and by Sec. 24(8) of the Judicial Code (28 U. S. C. Sec. 41(8).)

III.

Thomas C. Mills died August 28, 1945, and subsequently [2] on May 16, 1946, plaintiff Louise E. Mills

was duly and regularly appointed by the Superior Court of the State of California, in and for the County of Los Angeles, as Administratrix of the Estate of said Thomas C. Mills in proceeding numbered LBP 15807, records and files of said Court, and ever since that date has been and now is the Administratrix of said estate.

IV.

Defendant is a corporation organized under the laws of the State of California, authorized to do business therein and having its principal place of business in the County of Los Angeles, State of California, within the jurisdiction of this Court.

V.

At all times mentioned herein, defendant was and now is engaged at its said place of business in the County of Los Angeles, State of California, within the jurisdiction of this Court, in interstate commerce and in the production of goods, to wit, ships, for interstate commerce within the meaning of the Act.

VI.

Within three years last past, the defendant employed Thomas C. Mills, now deceased, at its said place of business as a Stationary Engineer, in which capacity said Thomas C. Mills was employed by the defendant in interstate commerce and in the production of goods, to wit, ships, for interstate commerce, within the meaning of the Act.

VII.

From the week ending October 6, 1943, until March, 1945, said Thomas C. Mills was employed by defendant at an hourly rate of \$1.53, and from March, 1945, until

his death August 28, 1945, was employed at an hourly rate of \$1.74. In substantially all of said weeks said Thomas C. Mills was credited with having worked forty-eight (48) hours, for forty (40) hours of which he was paid at straight time and for eight (8) hours of which he was paid at time [3] and one-half. In addition to said forty-eight hours for which he was credited and paid, he worked three (3) hours each week for which he received no credit or compensation.

VIII.

There is now due, owing and unpaid from the defendant to said Thomas C. Mills, Deceased, a sum equal to one and one-half times the regular rate at which said Thomas C. Mills was employed times three hours for each week of his employment by defendant, or the approximate sum of Seven Hundred (\$700), plus an equal amount as liquidated damages.

IX.

Sec. 16(b) of the Act provides that the Court in this action shall, in addition to any judgment awarded to the plaintiff, allow a reasonable attorney's fee to be paid by the defendant.

Wherefore, Plaintiff prays for judgment in the sum of \$700.00, plus an equal amount as liquidated damages, plus a reasonable attorneys' fee, for costs of suit and all proper relief.

WEINSTEIN & BERTRAM

By Perry Bertram

Attorneys for Plaintiff [4]

[Vertified.]

[Endorsed]: Filed Oct. 17, 1946. Edmund L. Smith, Clerk. [5]

[Title of District Court and Cause]

ANSWER TO COMPLAINT

Now comes the defendant, California Shipbuilding Corporation, and answers the complaint herein as follows:

I.

Answering the allegations contained in paragraph IV of said complaint, said defendant alleges that California Shipbuilding Corporation is a corporation organized and existing under the laws of the State of Delaware, and that said defendant is authorized to do business in California and has its principal place of business in the County of Los Angeles, State of California. Except as herein expressly admitted, defendant denies each and every allegation contained in paragraph IV of said complaint.

II.

Answering the allegations contained in paragraph V of said complaint, said defendant alleges that from May 4, 1943, until October 27, 1945, said defendant was engaged in the production of [6] ships under contracts with the United States Maritime Commission at the Commission's shipyard at Terminal Island, California. Except as herein expressly admitted, defendant denies each and every allegation contained in paragraph V of said complaint.

III.

Answering the allegations contained in paragraph VI of said complaint, said defendant alleges that Thomas C. Mills was employed by defendant from October 17, 1943, to August 28, 1945, in work necessary to the production of said ships being constructed under said contracts with the United States Maritime Commission. Except as herein expressly admitted, defendant denies each and every allegation contained in paragraph VI of said complaint.

IV.

Answering the allegations contained in paragraph VII of said complaint, defendant alleges that Thomas C. Mills was employed by defendant for the periods, rates and in the classifications as follows:

<u>Period</u>	<u>Rate</u>	<u>Classification</u>
October 17, 1943 to April 17, 1944	\$1.33 per hour	Operating Engineer
April 17, 1944 to November 13, 1944	\$1.53 per hour	Operating Engineer
November 13, 1944 to August 28, 1945	\$1.74 per hour	Operating Engineer

That Thomas C. Mills was fully paid for all hours in each workweek during which he worked in excess of forty (40) hours, and that any and all payments were made to him as required by the provisions of the Fair Labor Standards Act. Except as herein expressly admitted, defendant denies each and every allegation of said paragraph. [7]

V.

Answering the allegations contained in paragraph VIII of said complaint, defendant denies the allegations contained in said paragraph VIII of said complaint.

Wherefore, defendant prays that plaintiff take nothing by her complaint and that defendant go hence with its costs.

THELEN, MARRIN, JOHNSON & BRIDGES

By Robert H. Sanders

Attorneys for Defendant [8]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Nov. 21, 1946. Edmund L. Smith, Clerk. [9]

[Title of District Court and Cause]

PRE-TRIAL STIPULATION OF FACTS AND
STATEMENT OF ISSUES

FACTS

It is hereby stipulated between the plaintiff and defendant, through their respective counsel:

I.

At all times during the employment by defendant of plaintiff's decedent, defendant produced ships under contracts with the United States Maritime Commission. Upon the completion of each ship, it was delivered by defendant to the United States Maritime Commission at its shipyard at Terminal Island, County of Los Angeles, State of California.

Following the delivery of each ship, it was sent by the United States Maritime Commission from the State of California to points outside of the State of California. [10]

II.

During his employment by the defendant, plaintiff's decedent was employed at the following rates of pay:

From October 17, 1943, to and including April 23, 1944, \$1.33 per hour;

From November 14, 1944, to August 28, 1945, \$1.748 per hour;

For the period from April 24, 1944, to November 13, 1944, plaintiff and defendant each have different contentions as to what the hourly rate of pay was. These contentions are set forth in their respective pre-trial statement.

III.

During his employment by the defendant, plaintiff's decedent worked the full work day for six days each week, except during the following weeks:

Week ending December 25, 1943,

Week ending February 6, 1944,

Week ending March 17, 1945,

Week ending March 25, 1945,

Week ending April 1, 1945,

Week ending April 8, 1945,

Week ending August 18, 1945,

Week ending August 25, 1945,

Week ending September 2, 1945.

IV.

During his employment by the defendant, plaintiff's decedent worked on the day shift from October 17, 1943, to April 23, 1944, and on the graveyard shift from April 24, 1944, until August 28, 1945. During the period in which plaintiff's decedent was on the day shift, his scheduled shift was from 8:00 A. M. to 4:30 P. M., with one-half hour off for lunch. While on the graveyard shift, his scheduled shift was from 12:30 A. M. to 8:00 A. M., with one-half hour off for lunch. [11]

ISSUES

It is agreed by and between plaintiff and defendant, that the following are the issues to be determined in this action.

I.

Was plaintiff's decedent employed by defendant in the production of goods for interstate commerce within the meaning of the Fair Labor Standards Act of 1938?

II.

Did plaintiff's decedent work during his scheduled lunch periods? If so, on how many occasions?

III.

If plaintiff's decedent did work during his lunch periods, was he paid therefor during his employment from April 24, 1944, to November 13, 1944?

Dated: May 1, 1947.

WEINSTEIN & BERTRAM

By Perry Bertram

Attorneys for Plaintiff

THELEN, MARRIN, JOHNSON & BRIDGES

SAMUEL S. GILL, ROBERT H. SANDERS

By Robert H. Sanders

Attorneys for Defendant

[Endorsed]: Filed May 1, 1947. Edmund L. Smith,
Clerk. [12]

In the District Court of the United States in and for the
Southern District of California
Central Division

Civil Action File No. 4626-W

OLIVER P. ADAMSON, et al.,

Plaintiffs,

vs.

CALIFORNIA SHIPBUILDING CORPORATION,
a corporation,

Defendant.

Civil Action File No. 4747-W

JOSEPH D. KOURY,

Plaintiff,

vs.

CALIFORNIA SHIPBUILDING CORPORATION,
a corporation,

Defendant.

Civil Action File No. 4834-WM

CLEM H. ABBOTT, et al.,

Plaintiffs,

vs.

CALIFORNIA SHIPBUILDING CORPORATION,
a corporation,

Defendant.

Civil Action File No. 5246-M

CHARLES E. BAKER, et al.,

Plaintiffs,

vs.

CALIFORNIA SHIPBUILDING CORPORATION,
a corporation,

Defendant. [13]

Civil Action File No. 5639-W

JAMES M. CLARK, et al.,

Plaintiffs,

vs.

CALIFORNIA SHIPBUILDING CORPORATION,
a corporation,

Defendant.

Civil Action File No. 5863-W

WILLIAM A. POLLOCK,

Plaintiff,

vs.

CALIFORNIA SHIPBUILDING CORPORATION,
a corporation,

Defendant.

Civil Action File No. 5870-M

LOUISE E. MILLS, Administratrix of the Estate of
THOMAS C. MILLS, Deceased,

Plaintiff,

vs.

CALIFORNIA SHIPBUILDING CORPORATION,
a corporation,

Defendant.

Civil Action File No. 5875-B

M. E. ELLIOTT, et al.,

Plaintiffs,

vs.

CALIFORNIA SHIPBUILDING CORPORATION,
a corporation,

Defendant.

Civil Action File No. 5931-OC

FELIX A. TULLY, et al.,

Plaintiffs,

vs.

CALIFORNIA SHIPBUILDING CORPORATION,
a corporation,

Defendant [14]

Civil Action File No. 6113-BH

JOSEPH L. DWIRE, et al.,

Plaintiffs,

vs.

CALIFORNIA SHIPBUILDING CORPORATION,
a corporation,

Defendant.

Civil Action File No. 6176-Y

J. H. DEVINE, et al.,

Plaintiffs,

vs.

CALIFORNIA SHIPBUILDING CORPORATION,
a corporation,

Defendant.

Civil Action File No. 6286-Y

RAPHAEL J. CHERVENITSKI, et al.,

Plaintiffs,

vs.

CALIFORNIA SHIPBUILDING CORPORATION,
a corporation,Defendant.

Civil Action File No. 6340-PH

JOSEPH F. QUINN, et al.,

Plaintiffs,

vs.

CALIFORNIA SHIPBUILDING CORPORATION,
a corporation,

Defendant.

STIPULATION AND ORDER CHANGING NAME
OF DEFENDANT

It is stipulated by and between the parties, through their respective counsel, in each of the above-entitled actions, that all pleadings heretofore filed by the parties hereto, in each of said actions, may be deemed amended to change the name of said defendant from California Shipbuilding [15] Corporation to Joshua Hendy Corporation.

Dated: May 16, 1947.

THELEN, MARRIN, JOHNSON & BRIDGES
ROBERT H. SANDERS

Attorneys for Defendant

WEINSTEIN & BERTRAM

By Perry Bertram

Attorneys for Plaintiffs in Cases No. 4747-W, 5870-M

PERRY BERTRAM and MOHR & BORSTEIN

By Perry Bertram

Attorneys for Plaintiffs in Case No. 6176-Y

WEINSTEIN & BERTRAM

MOHR & BORSTEIN

By Perry Bertram

Attorneys for Plaintiffs in Case No. 5875-B

MEYER LITENBERG, MOHR & BORSTEIN
and PERRY BERTRAM

By Perry Bertram

Attorneys for Plaintiffs in Case No. 5931-OC

DAVID SOKOL

Attorney for Plaintiffs in Cases No. 4626-W,
5639-W, 6286-Y

DAVID SOKOL and CLETUS J. HANIFIN

By David Sokol

Attorneys for Plaintiffs in Cases No. 4834-WM,
5246-M, 6113-BH

WARNER, PERACCA & MAGANA and
LANE & LANE

By James O. Warner

Attorneys for Plaintiff in Case No. 5863-W

EDWARD FELDMAN and JAMES WOLF

By Edward Feldman

Attorneys for Plaintiffs in Case No. 6340-PH

It Is So Ordered; It Is Further Ordered that the Clerk of this Court make the necessary changes of record in each of the above-entitled actions and that two copies of this Stipulation and Order be filed by the Clerk in each of said actions.

Dated this 16th day of May, 1947.

PAUL J. McCORMICK

United States District Court Judge

[Endorsed]: Filed May 16, 1947. Edmund L. Smith,
Clerk. [16]

In the District Court of the United States in and for the
Southern District of California

Central Division

Civil Action File No. 5870-M

LOUISE E. MILLS, Administratrix of the Estate of
Thomas C. Mills, Deceased,

Plaintiff,

vs.

JOSHUA HENDY CORPORATION, a corporation,
Defendant.

FIRST AMENDED ANSWER TO COMPLAINT

Now comes the defendant, Joshua Hendy Corporation,
and answers the complaint herein as follows:

I.

Answering the allegations contained in paragraph IV of said complaint, said defendant alleges that Joshua Hendy Corporation is a corporation organized and existing under the laws of the State of Delaware, and that said defendant is authorized to do business in California and has its principal place of business in the County of Los Angeles, State of California. Except as herein expressly admitted, defendant denies each and every allegation contained in paragraph IV of said complaint.

II.

Answering the allegations contained in paragraph V of said complaint, said defendant alleges that from May 4, 1943, until October 27, 1945, said defendant was engaged in the production of [22] ships under contracts with the United States Maritime Commission at the Commission's

shipyard at Terminal Island, California. Except as herein expressly admitted, defendant denies each and every allegation contained in paragraph V of said complaint.

III.

Answering the allegations contained in paragraph VI of said complaint, said defendant alleges that Thomas C. Mills was employed by defendant from October 17, 1943, to August 28, 1945, in work necessary to the production of said ships being constructed under said contracts with the United States Maritime Commission. Except as herein expressly admitted, defendant denies each and every allegation contained in paragraph VI of said complaint.

IV.

Answering the allegations contained in paragraph VII of said complaint, defendant alleges that Thomas C. Mills was employed by defendant for the periods, rates and in the classifications as follows:

<u>Period</u>	<u>Rate</u>	<u>Classification</u>
October 17, 1943 to		
April 17, 1944	\$1.33 per hour	Operating Engineer
April 17, 1944 to		
November 13, 1944	\$1.53 per hour	Operating Engineer
November 13, 1944 to		
August 28, 1945	\$1.74 per hour	Operating Engineer

That Thomas C. Mills was fully paid for all hours in each workweek during which he worked in excess of forty (40) hours, and that any and all payments were

made to him as required by the provisions of the Fair Labor Standards Act. Except as herein expressly admitted, defendant denies each and every allegation of said paragraph. [23]

V.

Answering the allegations contained in paragraph VIII of said complaint, defendant denies the allegations contained in said paragraph VIII of said complaint.

And for a Further, Separate and Affirmative Defense, defendant alleges that the failure, if any, by defendant to fully comply with the Fair Labor Standards Act of 1938 was in good faith, and that defendant had reasonable grounds for believing that its act or omission in not paying deceased for the half-hour lunch period was not a violation of the Fair Labor Standards Act of 1938.

Wherefore, defendant prays that plaintiff take nothing by her complaint and that defendant go hence with its costs.

THELEN, MARRIN, JOHNSON & BRIDGES
ROBERT H. SANDERS

Attorneys for Defendant [24]

[Verified.]

[Endorsed]: Filed Jun. 12, 1947. Edmund L. Smith,
Clerk. [25]

[Title of District Court and Cause]

MEMORANDUM OF DECISION ON THE MERITS AND ORDER FOR JUDGMENT

We have given deliberate consideration to the applicability of Section 2(d) of the Portal to Portal Act of 1947 to this action and to the evidence in the record before us in this action.

We are of the opinion that under the concrete situation before us in this action, the provisions of the amendatory act effective May 14, 1947 are inapplicable.

We find that plaintiff's decedent under unrepealed and effective terms of the Fair Labor Standards Act was actually hired to, and did, perform productive services with right to compensation during the so called "lunch or eating periods." There was no real lunch period allocated. Services of the same type and continuity were rendered at all times.

Findings of Fact, Conclusions of Law and Judgment for the plaintiff for \$645.19,* unpaid overtime wages without liquidated damages and attorney's fees of \$75.00 and costs are ordered. [26]

Plaintiff's attorney will prepare and serve Findings of Fact, Conclusions of Law and Judgment accordingly within 5 days from notice of this ruling.

*\$1.33 x 1½ x 3 x 25—\$149.63

\$1.748 x 1½ x 3 x 63— 495.56

\$645.19

Dated at Los Angeles, California, this 3rd day of September, 1947.

PAUL J. McCORMICK

United States District Judge

[Endorsed]: Filed Sep. 3, 1947. Edmund L. Smith, Clerk. [27]

[Title of District Court and Cause]

OBJECTIONS TO PROPOSED FINDINGS OF
FACT AND CONCLUSIONS OF LAW

(See notations on 2nd page)

The defendant, Joshua Hendy Corporation, objects to the proposed findings of fact and conclusions of law heretofore served upon it as follows:

1. Defendant objects to paragraph 8 of the said findings of fact in that said paragraph implies that Thomas C. Mills, deceased, did not at any time during his shift eat his lunch. It is submitted that the evidence clearly showed that he did take his lunch to work with him daily and ate it during his shift.

2. Defendant objects that the proposed findings of fact and conclusions of law are insufficient to support the judgment both as to defendant's liability and the court's jurisdiction of the cause. There must be a finding of fact and a conclusion of law as to whether the alleged lunch period activity, during the period in issue, was compensable by either an express provision of a written or non-written contract or by a custom or practice. For Section 2 [28] of the Portal-to-Portal Act of 1947 expressly provides that if the activity is not so compensable, the employer shall not be subject to liability, and further, that if not so compensable this court has no jurisdiction of the action.

Dated: September 10, 1947.

Respectfully submitted,

THELEN, MARRIN, JOHNSON & BRIDGES

By Robert H. Sanders

Attorneys for Defendant

Sept. 11, 1947

The foregoing were before the Judge this day were considered, not adopted, and appropriate Findings of Fact, Conclusions of Law and Judgment in line with Memorandum of Decision of Sept. 3, 1947, were signed and filed this Sept. 11, 1947.

PAUL J. McCORMICK

Judge [29]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Sep. 11, 1947. Edmund L. Smith, Clerk. [30]

[Title of District Court and Cause]

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

This cause having come on regularly for trial before the above entitled Court, Hon. Paul J. McCormick, Judge Presiding, on May 8, 1947, the plaintiff being present in person and by her counsel Perry Bertram of Weinstein & Bertram, and the defendant being represented by its counsel Samuel S. Gill and Robert H. Sanders of Thelen, Marrin, Johnson & Bridges, Samuel S. Gill and Robert H. Sanders, and both parties having introduced evidence, both oral and documentary, having entered into various stipulations of facts, having submitted written briefs, and having been fully heard, and the cause having been submitted,

The Court, being fully advised, makes the following
FINDINGS OF FACT

1. This action was brought by the plaintiff to recover from the defendant unpaid overtime wages and liquidated damages as [31] provided by the Fair Labor Standards

Act of 1938 (Public No. 718, 75th Cong., Ch. 676, 52 Stat. 1060-1069 (1938), 29 U. S. C., Sec. 201-219) hereinafter referred to as the Act.

2. At all times mentioned in these Findings, defendant was a corporation duly organized under the laws of the State of Delaware, authorized to do business in California, and having and operating a shipyard located at Wilmington, California, within the territorial jurisdiction of this Court, where it was engaged in producing ships. All of the ships produced by the defendant were, upon their completion, delivered at said shipyard to the United States Maritime Commission, which thereafter transported, delivered or took said ships from the State of California to points outside the State of California.

3. Thomas C. Mills died prior to the commencement of this action, and thereafter, before commencing this action, the plaintiff was duly and regularly appointed by the Superior Court of the State of California in and for the County of Los Angeles, as the Administratrix of the Estate of said Thomas C. Mills, and has at all times since said appointment continued to act as said Administratrix.

4. From prior to October 17, 1943, until August 28, 1945, said Thomas C. Mills was employed by the defendant at and about its said shipyard in Wilmington, California, in the capacity of engineer, in which capacity said Thomas C. Mills was employed by the defendant in the production of said ships and in processes and occupations necessary to said production of ships.

5. From October 17, 1943, to and including April 23, 1944, said Thomas C. Mills was employed by the defendant at an hourly rate of \$1.33. From April 24, 1944, to and including August 28, 1945, said Thomas C. Mills was employed by the defendant at an hourly rate of \$1.748.

6. From October 17, 1943, to and including April 23, 1944, said Thomas C. Mills worked in excess of forty hours in each of twenty-five (25) workweeks; from April 24, 1944, to and including August 28, 1945, said Thomas C. Mills worked in excess of forty [32] hours in each of sixty-three (63) workweeks.

7. During the entire period of his employment by the defendant, including the workweeks mentioned in Finding 6, the wages paid to Thomas C. Mills compensated for all of the hours between his starting time at the beginning of his shift and his quitting time at the end of his shift, except for one-half hour each day during which he was scheduled to take his lunch period, for which one-half hour each day he received no compensation.

8. In each of the workweeks mentioned in Finding 6, Thomas C. Mills was required by the defendant to, and did, spend his entire shift, including the said one-half hour lunch periods at his place of duty in the performance of the duties for which he was hired by the defendant, and was not excused or relieved therefrom for the purpose of taking lunch. Each of said one-half hour lunch periods constituted hours worked by Thomas C. Mills, totaling three hours in each week, for which he received no compensation, which hours were in excess of forty hours in each of the workweeks mentioned in Finding 6.

9. The amount of overtime compensation to which Thomas C. Mills was entitled and which defendant was required to pay by the terms of the Fair Labor Standards Act of 1938, for the said overtime hours was and is the sum of \$149.63 for the period from October 17, 1943, to and including April 23, 1944, plus the sum of \$495.56

for the period from April 24, 1944, to and including August 28, 1945, or a total of \$645.19.

10. The omission on the part of the defendant to pay the said overtime wages due Thomas C. Mills was in good faith and upon reasonable grounds for believing that said omission was not a violation of the Act.

11. Plaintiff's attorneys have rendered legal services herein for which plaintiff is entitled to recover of and from the defendant the sum of \$75.00, as and for attorneys' fees. [33]

From the foregoing Findings of Fact, the Court draws the following

CONCLUSIONS OF LAW

1. Jurisdiction of this action is conferred upon the Court by the Act and by Section 24(8) of the Judicial Code (28 U. S. C. §41(8).)

2. From October 17, 1943, to and including August 28, 1945, the period involved in this action, Thomas C. Mills was employed by the defendant in the production of goods for interstate commerce and in processes and occupations necessary to such production, within the meaning of the Act.

3. Plaintiff is entitled to bring and prosecute this action as the duly and regularly appointed, qualified and acting Administratrix of the Estate of Thomas C. Mills, deceased.

4. The activity engaged in by Thomas C. Mills during each of his one-half hour lunch periods for which he received no compensation was a compensable activity within the meaning of the Act, as amended by the Portal-to-Portal Act of 1947 (Public Law 49, 80th Cong., Ch. 52).

5. For the period from October 17, 1943, to and including April 23, 1944, plaintiff is entitled to recover of the defendant the sum of \$149.63, as and for unpaid, overtime wages.

6. For the period from April 23, 1944, to and including August 28, 1945, plaintiff is entitled to recover of the defendant the sum of \$495.56, as and for unpaid overtime wages.

7. The plaintiff is not entitled to recover any additional sums as or for liquidated damages.

8. Plaintiff is entitled to recover of the defendant the sum of \$75.00 as and for attorneys' fee for legal services rendered herein.

9. Plaintiff is further entitled to recover her costs of suit.

September 11th, 1947.

PAUL J. McCORMICK

Judge [34]

The foregoing Findings of Fact and Conclusions of Law are approved as to form. September , 1947. Thelen, Marrin, Johnson & Bridges and Samuel S. Gill and Robert H. Sanders, by, Attorneys for Defendant. [35]

Received copy of the within Findings, etc., this 8th day of Sept. 8, 1947. By Robert H. Sanders, Attorneys for Defendant.

[Endorsed]: Filed Sep. 11, 1947. Edmund L. Smith, Clerk. [36]

In the District Court of the United States in and for the
Southern District of California

Central Division

No. 5870-M

LOUISE E. MILLS, Administratrix of the Estate of
Thomas C. Mills, Deceased,

Plaintiff,

vs.

JOSHUA HENDY CORPORATION, a corporation,
Defendant.

JUDGMENT

This cause having come on regularly for trial before the above entitled Court, Hon. Paul J. McCormick, Judge Presiding, on May 8, 1947, the Plaintiff being present in person and by her counsel Perry Bertram of Weinstein & Bertram, and the defendant being represented by its counsel Samuel S. Gill and Robert H. Sanders of Thelen, Marrin, Johnson & Bridges and Samuel S. Gill and Robert H. Sanders, and both parties having introduced evidence, both oral and documentary, having entered into various stipulations of facts, having submitted briefs, and having been fully heard, and the cause having been submitted,

The Court, having made its Findings of Fact and drawn its Conclusions of Law, orders Judgment as follows:

It is ordered, adjudged and decreed that Plaintiff have and recover of the defendant the sum of \$645.19 as over-time wages, the further sum of \$75.00 as and for attorneys' fees, and her costs of [37] suit, taxed in the sum of \$39.00.

September 11th, 1947.

PAUL J. McCORMICK

Judge

Approved as to form September 8th, 1947: Thelen, Marrin, Johnson & Bridges, Samuel S. Gill, and Robert H. Sanders, by Robert H. Sanders, Attorneys for Defendant.

Judgment entered Sep. 11, 1947. Docketed Sep. 11, 1947. C. O. Book 45, page 421. Edmund L. Smith, Clerk; by E. M. Enstrom, Jr., Deputy.

[Endorsed]: Filed Sep. 11, 1947. Edmund L. Smith, Clerk. [38]

[Title of District Court and Cause]

NOTICE OF APPEAL

Notice is hereby given that Joshua Hendy Corporation, defendant in the above-named action, appeals to the Circuit Court of Appeals for the Ninth Circuit the Final Judgment entered in this Court on September 11, 1947, in Civil Order Book No. 45, page 421, in the above-entitled action.

Dated: October 3, 1947.

THELEN, MARRIN, JOHNSON & BRIDGES

By Robert H. Sanders

Attorneys for Defendant

[Endorsed]: Filed & mld. copy to Weinstein & Bertram, attys. for plf., Oct. 3, 1947. Edmund L. Smith, Clerk. [39]

[Title of District Court and Cause]

NOTICE OF CROSS APPEAL

Notice is hereby given that Louise E. Mills, plaintiff in the above titled action, appeals to the Circuit Court of Appeals for the Ninth Circuit from

I. That portion of the Final Judgment entered in this Court on September 11, 1947, in Civil Order Book No. 45, page 421 which denied to the plaintiff recovery for liquidated damages on account of the defendant's failure to pay wages when due.

II. That portion of the same Final Judgment which fixed the amount of attorney's fees allowed to plaintiff at the sum of \$75.00.

Dated: November 6, 1947.

MOHR & BORSTEIN, and
PERRY BERTRAM

By Perry Bertram

[Endorsed]: Filed & copy mld. to appellant, Nov. 10, 1947. Edmund L. Smith, Clerk. [42]

[Title of District Court and Cause]

EXTENSION OF TIME WITHIN WHICH TO FILE
RECORD ON APPEAL WITH APPELLATE
COURT

It is requested that the time within which to file the record on appeal with the Circuit Court of Appeals, Ninth Circuit, be extended to November 26, 1947. This request is made because there has been some delay in getting the necessary papers prepared for the record on appeal.

Dated: November 12, 1947.

THELEN, MARRIN, JOHNSON & BRIDGES
ROBERT H. SANDERS

Attorneys for Defendant and Appellant

It is ordered that the time within which the record on appeal may be filed with the Circuit Court of Appeals, Ninth Circuit, in the above entitled action is extended to and including November 26, 1947.

Dated: November 12th, 1947.

PAUL J. McCORMICK

U. S. District Court Judge

[Endorsed]: Filed Nov. 12, 1947. Edmund L. Smith, Clerk. [44]

[Title of District Court and Cause]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages, numbered from 1 to 45, inclusive, contain full, true and correct copies of Complaint for Wages and Liquidated Damages Due Under the Fair Labor Standards Act of 1938; Answer to Complaint; Pre-Trial Stipulation of Facts and Statement of Issues; Stipulation and Order Changing Name of Defendant; Motion to Amend Answer to Complaint; First Amended Answer to Complaint; Memorandum of Decision on the Merits and Order for Judgment; Objections to Proposed Findings of Fact and Conclusions of Law; Findings of Fact and Conclusions of Law; Judgment; Notice of Appeal; Designation of Record on Appeal; Notice of Cross Appeal; Bond on Cross Appeal; Extension of Time Within Which to File Record on Appeal With Appellate Court; Plaintiff's Designation of Additional Record on Appeal, which, together with certified copies of Plaintiff's Exhibit 1 and Defendant's Exhibit A, and one volume of Reporter's Transcript, transmitted herewith, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$24.90, which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court this 20 day of November, A. D. 1947.

(Seal)

EDMUND L. SMITH

Clerk

By Theodore Hocke

Deputy

[Title of District Court and Cause]

Honorable Paul J. McCormick, Judge Presiding

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California, Thursday, May 8, 1947

Appearances:

For the Plaintiff: Messrs. Weinstein & Bertram, by
Perry Bertram, Esquire.

For the Defendant: Messrs. Thelen, Marrin, Johnson
& Bridges, by Robert H. Sanders, Esquire.

Los Angeles, California, Thursday, May 8, 1947—
10:00 A. M.

The Court: Call the case, Mr. Clerk.

The Clerk: Louise E. Mills, Administratrix of the
Estate of Thomas C. Mills, Deceased, versus California
Shipbuilding Corporation, a corporation, No. 5870-M-
Civil.

Mr. Bertram: The plaintiff is ready, your Honor.

Mr. Sanders: Ready for the defendant, your Honor.

The Court: Proceed, gentlemen.

Mr. Sanders: Your Honor, I think it might be point-
ed out to the court that the portal to portal bill has been
passed by both the Senate and the House of Representa-
tives, according to newspaper reports, and has been sent
to the White House. I believe the report was that that
was done last Thursday or Friday. It may be that the
bill is being signed at the present time.

If so, as your Honor knows, there are certain features
of that Act which would affect our evidence in this case.
I merely mention that to the court as a possibility that

we may wish a further hearing in this matter in light of that.

Mr. Bertram: If the court please, according to my knowledge of the present form of the bill and the issues involved in this case, I do not think it will be necessary—I do not think there would be any effect upon this case on [3*] the passage of that bill.

Now, I would make no objection to an offer of evidence made in the light of what the defendant's counsel conceives the bill to contain on the ground that it is irrelevant under the present state of the law, so we might take that into consideration. But this is not a portal to portal claim.

The Court: We do not know what "portal to portal" claims are until we know what the statutory law is.

Mr. Bertram: In the sense that it is walking or traveling from the entrance to the employer's place of business to the place of work.

Mr. Sanders: I might say, your Honor, I do not think we could intelligently proceed on the theory that the bill is enacted and try to produce evidence of that because none of us have seen the bill.

The Court: The court has not seen the finished product. It has received several proposals that came from various agencies, but this court has never seen the finished bill that was the result of the concurrence of the two Houses.

I think we should hear the evidence and then if it becomes propitious to defer decision until such time as the President either acts or fails to act would be the proper procedure. [4]

Mr. Bertram: Very well, your Honor.

We might state by way of introduction that both parties have set forth their respective positions in a pre-trial statement.

The Court: Yes, I have read the memorandum and the pre-trial briefs.

Mr. Bertram: In summation the plaintiff will offer evidence to establish that the decedent did work additional hours for which he was not paid. We will not be concerned with evidence on the issue of coverage.

The Court: The pre-trial stipulation of facts and the statement of the issues has been filed?

Mr. Bertram: Yes, I believe it has. If it has not it will now be filed as a part of the record in this trial. I will look at the original file to see if it is here. Yes, it is in the file, having been filed on May 1st, 1947. You may proceed.

Mr. Bertram: Call Mr. Frank Gillen.

FRANK GILLEN,

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Frank Gillen. [5]

Direct Examination

By Mr. Bertram:

Q. Mr. Gillen, what is your business or occupation?

A. Steam engineer.

Q. Are you licensed in that capacity?

A. Yes, sir.

(Testimony of Frank Gillen)

Q. Here in the state of California?

A. Yes, sir.

Q. Mr. Gillen, were you ever employed at the California Shipbuilding Corporation? A. Yes, sir.

Q. In what capacity?

A. Steam plant engineer.

Q. In the following questions, Mr. Gillen, which I have to ask you, I am going to direct your attention and ask you to direct your answers to the period commencing October 1943 and terminating in August 1945.

Were you employed at the Cal Shipbuilding Corporation during that period? A. Yes.

Q. Continuously? A. Yes, sir.

Q. During your employment in that period did you have occasion to know one Thomas C. Mills?

A. Yes. [6]

Q. Do you know in what capacity he was employed?

A. Yes, sir. He worked swing shift or graveyard shift following me. I was on swing.

Q. On the same job? A. Yes, sir.

Q. And will you describe the duties of that job as you know it?

Mr. Sanders: I object to that, your Honor, as irrelevant. The witness testified he was on the swing shift and that he knows Mr. Mills was on the graveyard shift and what this witness' duties were would have no bearing on Mr. Mills' duties.

Mr. Bertram: I did not ask the witness for his duties. I asked the witness the duties of the job as he knew it.

(Testimony of Frank Gillen)

Mr. Sanders: I object to that as being irrelevant to the issues here. The only issue before the court is the work of Mr. Mills.

The Court: I do not think it would be proper to assume this witness is qualified to testify as to the work or status of an employee who is not doing similar work. In the absence of any showing that this witness had supervision over the employee in question, Mr. Mills, the deceased, I do not believe he can testify to that.

Mr. Bertram: We will offer to show by this witness, your Honor, that the plant was operated in a certain manner; [7] that that manner made it impossible for an employee to take time off for lunch. That the manner in which it was operated was the same during all three shifts. We are faced with the situation that the employee is deceased. We will show that he was the only employee on that shift in this particular plant. That his situation was identical, this witness will testify if permitted, to the situation with respect to the witness. He was the only employee on his shift and he will testify that, if permitted, that the manner in which the work had to be performed was such that no time off could be taken for rest, relief or lunch.

The Court: Is it contended that the two men, the witness and the deceased, were co-relative workers doing precisely the same thing only at different times?

Mr. Bertram: Exactly, your Honor.

The Court: Objection overruled.

Q. By Mr. Bertram: Will you then, Mr. Gillen, describe the duties of the job as you knew it?

Mr. Sanders: May I interpose a question on voir dire here to see if this witness has got the facts or has

(Testimony of Frank Gillen)

received the facts which will give him the ability to testify as to this, other than inferences or mere hearsay on his part?

The Court: Yes, you may ask one or two questions. [8]

Voir Dire

By Mr. Sanders:

Q. Mr. Gillen, you were employed during this period, October 1943 to August 1945, on the swing shift, is that right? A. Yes, sir.

Q. And what was your job?

A. Steam plant engineer.

Q. Will you repeat that, please? I didn't get it.

A. Steam engineer.

Q. And were you on that shift the entire period?

A. I just haven't the right, exact figures of that, the date that I was taken and put in there because the plant wasn't in operation just at the start of that, but as soon as that plant was put in operation I went on it and stayed there to the finish.

Q. Now, during this period did you at any time work with Mr. Mills?

A. Yes. There was a time when we did once, a little while together.

Q. When was that?

A. Well, it was—I can't tell you that right date either, but I guess we can get it if we have to. There was a time that when they was changing the shifts there and we was heating oil in the cars. We had so many ships on those [9] docks there trying to get them all ready. There was a time when we used the steam plant and also that steam crane that we had out there, the

(Testimony of Frank Gillen)

horizontal oiler and we was heating oil with some and furnishing steam for the line with the rest when we worked over—some overtime of two hours when we would be working together on the same shift.

Q. How long a period was that? About a week or so? A. No; I think it was around two months.

Q. Two months?

A. Yes. I could tell by looking back at my time slips but I haven't been where they were for some time.

Q. Right now you are not sure whether that was during this period or possibly prior to it, are you?

A. Couldn't have been prior to it because the plant wasn't running then.

Q. Now, outside of that period of approximately two months where you worked with him for two hours, you never at any time worked on the same shift or worked with him, did you?

A. Ne, sir; he relieved me. I worked until 12:30 and he came in at twelve and was there ready to relieve me, so that I could go home at a certain time. We was always together when he come in that half hour. He and I worked up until 12:30 and he worked from 12:30 to eight.

Q. Then the only knowledge that you would have as to what Mr. Mills did on this shift, other than during this two [10] months' period, would be from the conclusion of what you did on your shift, isn't that right?

A. I knew that he couldn't do any different because it was the only way it could be operated.

Q. But you are basing that upon your conclusion of what you did during your work down there, isn't that right, Mr. Gillen? A. Yes, sir.

(Testimony of Frank Gillen)

Mr. Sanders: On the basis of that testimony, your Honor, I again interpose my objection.

The Court: Objection overruled. Mr. Gillen, to clarify the situation, how many steam engineers were there in the particular place where you worked from October 1943 to August 1945?

The Witness: You mean different ones or on each day?

The Court: Well, I want to find out about the situation. I don't know what it is myself but I think the question is clear. Read the question again.

(Question read.)

The Witness: There was three of us.

The Court: During the shift on which you worked?

The Witness: One on each shift, three of us.

The Court: Very well, proceed.

Mr. Bertram: I think I will withdraw the pending question and ask some further preliminary questions. [11]

Direct Examination (Continued)

By Mr. Bertram:

Q. Mr. Gillen, who was on the day shift?

A. Henry Sweet.

Q. And who was on the swing shift?

A. Tom was, Mills was on days for a long time and then changed and Hank Sweet was on days the last year or 16 months that it operated.

Q. And who was on the swing shift?

A. I was.

Q. And who was on the graveyard shift?

A. Tom Mills.

(Testimony of Frank Gillen)

Q. Tom Mills after he changed with Hank Sweet on the day shift? A. Yes, sir.

Q. Will you describe fully your place of work? Was it within doors?

A. Yes, your boiler room set—your boiler set along here and the office was right here—an open door against it and this building was put in here for a little place there, just a small, little place. This all opened right in together where you could set right in this office door or walk around in here or do whatever you wanted to and watch your gauges and everything right from this door.

Q. Was there one or more steam boilers? [12]

A. One.

Q. And were the boilers and the office both within doors? A. Yes, sir.

Q. Under a roof? A. Yes, sir.

Q. Where were you stationed with reference to the steam boiler, Mr. Gillen?

A. Right up against it all the time.

Q. What had to be done by the steam engineer on duty during his particular shift? A. Well—

Q. Describe the various things which had to be done.

A. Any steam boiler has to be watched pretty close and these were not automatic. These were all hand-operated. You had to watch your gauges, your water, your steam, your compressors. We had pumps to pump the fuel up to the burner. That had to be watched all the time and you had a water pump that put the water into the boilers. That had to be watched and set and regulated and you had to go around to the end of the boiler and fire it by hand.

Q. What was it fired with? A. Oil.

(Testimony of Frank Gillen)

Q. How many gauges were there to watch?

A. Four. [13]

Q. What gauges were those?

A. Your water gauge, your steam gauge and pressure gauge; your fuel line pump and the other water pump that put the water into the boiler.

Q. And how many valves were there to manipulate during the course of your work?

A. There were three.

Q. What valves were those?

A. There was both pump valves and your oil feed valve, unless your pump was shut down, and then you had your valves on your injector. That was an additional valve which we didn't use very much, only when we was packing the pumps and stuff.

Q. Will you tell us if you know, what the steam from this steam boiler was used for in that yard?

A. Yes. Your main line went right out and went right up to the outfitting docks and they used steam for heating the oil and doing all the pumping up and down the lines.

Q. Heating what oil, Mr. Gillen?

A. The oil that was pumped on all the ships and for washing out all the new boilers, all the boilers and everything. Furnishing steam on all the boats on the outfitting dock.

Q. What capacity was the steam boiler which you attended? [14]

A. That was pressure?

Q. Yes. A. 200 pounds.

Q. That was pressure and capacity—strike that. Was that boiler kept at full capacity during the greater part of the time?

A. Yes, sir.

(Testimony of Frank Gillen)

Q. Could you give us an estimate of how much of the time while you were there, the steam boiler was not kept at full capacity?

A. Well, no time unless it was being washed—it was being shut down for maybe one shift to wash out the boiler and re-brick the fire box or something.

Q. How often did that happen?

A. Well, the boiler would be washed down quite often but the re-bricking, that wouldn't be set down only for a short time for that, the re-bricking. The re-bricking of the fire box is only done about once a year.

Q. Now, Mr. Gillen, what was the situation in that steam plant with respect to the lunch period?

A. We didn't have any.

Q. Will you describe that situation?

A. Yes, sir. We carried our own lunch with us and after you are on four or five hours you feel you want a little something to eat and you get a sandwich and may be you [15] can eat it and maybe you can't. Maybe you will walk around and turn these valves up while you are eating.

Q. Mr. Gillen, what was the longest period of time that you could leave that steam boiler unwatched or unattended?

A. Well, that depends.

Q. Give me the longest period of time.

A. I wouldn't say that you ought to be away from it over five minutes and sometimes not two or three minutes.

Q. Were there toilets—toilet facilities provided for you, Mr. Gillen?

A. Yes, sir, right at the back of the building.

(Testimony of Frank Gillen)

Q. How long would you have to take away from the boiler to go to the toilet?

A. Well, you had better make it pretty quick.

Q. What would you say would be the time in minutes, if you know?

A. Well, I wouldn't say five minutes.

Q. Was that toilet used by the employees generally in the yard or only the steam plant employees?

A. At the first start it was used only for us—the one that was put in there when the plant was built was only for that particular reason, but about a year later, before the yard was closed up, they built a new one there within arm's reach of the building and that was for the outfitting [16] dock workers, for everybody—men and women both. A big double one.

Q. Mr. Gillen, you say you brought a lunch to work on your shift? A. Always.

Q. Do you remember any occasion when you were able to eat that lunch from beginning to end uninterrupted? A. Well, I don't know as I ever did.

Q. Do you know whether or not Mr. Mills brought a lunch with him?

A. Yes, he did. He carried his lunch.

Q. Do you know what he carried?

A. Well, he didn't carry the kind of lunch that I did but he carried more fruit than anything else.

Q. Now, you testified earlier that Mr. Mills came to work about twelve o'clock midnight?

A. Yes, sir.

Q. Do you know what time the shift started?

A. 12:30.

(Testimony of Frank Gillen)

Q. What did he do in that first half hour between the time he got to work and the time his shift started?

A. Well, you see we had our meters to read and one thing and another and when you are leaving a shift you read your meters, of what you have used, and you always figure on being there a little ahead of time so the other man can get [17] washed up and get relieved and go home. But they read those meters before he starts in at 12:30. There wasn't much to do but sometimes you don't always get in that yard at the same time when you are coming to work. You might be there at 12:15 or 12:00 or 12:20, just so you are there ahead of the time you have to go to work.

Q. So we may be clear, Mr. Gillen, when you used the word "you" do you refer to Mr. Mills?

A. Yes; any man relieving the other man. He can't always be there at the same minute.

Q. Now, Mr. Gillen, during the period of about two months when you stayed over for some two hours beyond the end of your shift, what did both you and Mr. Mills do?

A. I think I stated that. You see we was operating the steam plant and the boiler both when they had eight and nine ships on the docks and they were furnishing steam for heating oil and pumping oil and that kind of stuff.

Q. In other words, one of you attended the regular steam boiler?

A. Sure.

Q. And the other attended the spare that was being used, is that it?

A. Yes.

(Testimony of Frank Gillen)

Q. Mr. Gillen, was any employee provided to relieve you for lunch or other rest periods? [18]

A. No, sir.

Q. How far away could you get from the steam boiler at any time while you were on duty?

Mr. Sanders: I object to that as calling for a conclusion of the witness. He hasn't testified he ever got away from the boiler.

Mr. Bertram: Let me re-phrase the question.

Q. By Mr. Bertram: Are there any regulations which you, as a licensed engineer, are familiar with, which prescribed the distance away from the steam boiler which you may get?

A. I think the City of Los Angeles doesn't allow you over—I don't know whether it is 100 or 200 feet, but I know I never left that far myself.

Mr. Bertram: You may cross examine.

Cross Examination

By Mr. Sanders:

Q. Did you go to work at the Cal Ship as an engineer, Mr. Gillen? A. No, sir.

Q. When did you first start working there as an engineer?

A. Just shortly after they put the boiler in. I don't know the exact date. About 16 months before it closed down.

Q. What year was that? Was that in 1943? [19]

A. Yes.

Q. And had you done that type of work before you went to work at Cal Ship?

A. Well, since I was 14 years old, yes.

(Testimony of Frank Gillen)

Q. Working with steam boilers and things like that?

A. Yes, sir.

Q. And the practice where you worked on other steam plants as an engineer—did you ever work in one where you were the only engineer present on your shift?

A. Yes, sir.

Q. And you, in that employment at other places, were required to stay in the vicinity of the boiler, weren't you?

A. Yes, sir.

Q. And you understood that when you took that job at Cal Ship, didn't you?

A. Understood what?

Q. You understood that you were supposed to remain in that vicinity, in the vicinity of the boiler when you took the job at Cal Ship?

A. I think you will find that every steam engineer has to stay with his engine until he is relieved.

Q. As a licensed engineer you have to be familiar with those regulations?

A. Yes, sir.

Q. Now, isn't it true that you were allowed to bring [20] your lunch and you were told to bring your lunch and eat it during your shift?

A. Nobody ever said anything about it, about my bringing my lunch.

Q. Well, prior to becoming the steam engineer at Cal Ship you brought your lunch to work, didn't you, and you ate it during the shift?

A. I carried a lunch there. I carried a lunch all the time I worked for Cal Ship.

Q. Now, in the steam plant you stated there was a little office there?

A. Yes.

Q. What was this little office? Will you describe that for me?

(Testimony of Frank Gillen)

A. Yes. A building about eight foot square where we kept water softener in there so it wouldn't get wet or dirty, the salt and stuff and also we used it for our office. It was about eight or ten foot square right on the south side of the steam plant building.

Q. And did you have a desk and chair in there?

A. Yes, sir.

Q. And was that where you normally had your lunch?

A. Yes, sir.

Q. And whereabouts were these gauges that you watched in relation to the office? [21]

A. Right in front of you.

Q. Just outside the office? A. Yes, sir.

Q. And during the course of your shift you would have lull periods, wouldn't you, when you would be able to sit down?

A. Sometimes if they wasn't pulling too heavy. It depended on how many ships were on the outfitting docks. If there was a full line of them there they were pulling every pound it could make because the boilers wasn't too large for the job. But if they was a fewer on—it depended on how many boilers they was washing out at the time too. That was your heavy pull.

Q. You would know pretty well when you came on a given day what kind of run your boilers was going to have to make, wouldn't you? A. No.

Q. That would change from hour to hour?

A. Yes, sir.

Q. And how often would you have to fire the boiler by hand? A. All the time.

Q. Well, now, you don't mean by "all the time" every minute of your shift?

(Testimony of Frank Gillen)

A. I mean that you couldn't—you can't, unless you [22] have got an automatic feed—you can't regulate an oil burner boiler up there because you don't know any minute what time four or five valves up the line are going to be pulled wide open. They are three-inch valves and when they pull that you had better keep busy or you ain't going to have any steam. You can change them every five minutes the whole shift or every two or three minutes sometimes.

Q. Well, normally you wouldn't be firing the boiler every three minutes for your swing shift?

A. No; but I have been there eight hours when I walked back and forth wondering whether I was going to keep it up from then on and didn't set down in that office during that eight hours. That is how busy we was when we had a lot of ships on that outfitting dock.

Q. That was an exceptional situation, though? You didn't do that most of the time, did you, Mr. Gillen?

A. A good many months that we did do that.

Mr. Sanders: Now, before I proceed further, your Honor, I would like to inquire if counsel is enlarging the issues here as to this early time that he brought out when Mr. Mills came to work, and injecting the portal to portal phase in this or not.

Mr. Bertram: There again we are confused as to terms. That is, I don't call it "portal to portal". Because of the unusual nature of this claim—that is, I was retained by [23] the widow after the passing away of the employee. I didn't know that the man came to work a half hour early.

The Witness: I didn't come to work—I didn't say that.

(Testimony of Frank Gillen)

Mr. Sanders: We went over the time cards together.

Mr. Bertram: I think since we have joined the issue and framed the issues as to the half hour lunch period that we will confine our claim to that. I should, of course, consult my client as to that but we have learned something here that I didn't know before. If I may have just a moment to do that.

The Court: Very well.

Mr. Bertram: Mrs. Mills says she is prepared to keep the issue confined to the lunch hour that we claim was lost, a half hour lunch period each day at work.

The Court: Do you mean by that you are reserving for some other case any additional time?

Mr. Bertram: No, your Honor. It is my understanding that once an action is brought for overtime wages under the Fair Labor Standards Act that becomes *res adjudicata* as to all the issues which might be litigated in that claim.

The Court: That is your position and it is so understood?

Mr. Bertram: Yes.

The Court: Proceed. [24]

Q. By Mr. Sanders: What were the hours that you worked, Mr. Gillen, in the afternoon? Until sometime around midnight, was it not? A. Four to 12:30.

Q. What time would you normally have your lunch on that shift? About nine o'clock?

A. Oh, any time along there.

Q. Well, I mean normally you would probably have some time when you preferred to eat your meal, didn't you?

(Testimony of Frank Gillen)

A. About that time. Sometimes a little earlier or a little later. It could be when you get good and hungry. That was generally the time that everybody did eat.

Q. These gauges that you would watch you could watch from the desk where you say you ate your lunch?

A. Yes.

Q. And what gauges were important to watch from the safety standpoint?

A. The main thing on the boiler is the water.

Q. The water gauge?

A. And the steam comes next.

Q. As a part of your duties you were supposed to visually watch these gauges at all times? A. Yes.

Q. By that question I don't mean you would keep your eyes fixed on them continually for eight hours but you are to [25] take a look at the gauges quite often, is that right? A. Yes, sir.

Q. Now, aside from firing the boiler what other duties were there that occurred quite often, regularly during the shift?

A. The firing wasn't any more—there is nothing to firing a boiler, but you have got to keep your pumps and everything and gauges working and everything and you have got to keep everything working in order to keep water in there and it is oil fed. It has to be set at the right temperature. Now, if four or five of those valves are dragged open at once up there the heavy draw on that can siphon the water out of your boiler. If the cold water comes up and hits that pipeline anywhere along there that cold water will siphon that water out of the boiler and you don't know when it is going to do that. You have to be ready at all times for those emergencies.

(Testimony of Frank Gillen)

Q. You say there is nothing to firing a boiler. You mean by that that it takes only a matter of a few seconds to do that? A. Yes.

Q. Describe to the court what is necessary to be done?

A. It takes every minute of your eight hours to keep watching to see that it is fired right.

Q. How do you watch it to see that it is fired right? [26] You mean you look at a gauge or look at the fire itself?

A. Well, you can look at your fire for one thing and you can look at your—you don't want a fire that smokes. You want a white fire. You have to keep it regulated the right height—high enough on there to hold your steam at the right temperature all the time.

Q. Now, isn't it true that during your shift normally you would have periods of time when you would be able to sit down at the desk and you wouldn't have any duties to do? A. Sometimes.

Q. And isn't it true that that would occur more than once, generally, during a shift?

A. Well, I guess you could probably take a few minutes at a time—maybe five or ten minutes sometimes. There are certain times that they are dragging you heavier than others. That can't be steady.

Q. And when you elected to sit down for lunch you would normally take a time when you thought there would be a lull period, wouldn't you, so you would be able to eat your meal without being interrupted?

A. Yes, sir, it would be better.

Q. Did they have a hot plate in there to make coffee on? A. No, a steam pipe.

(Testimony of Frank Gillen)

Q. You didn't have any way to get coffee? [27]

A. Yes, a steam pipe.

Q. You did have coffee there? A. Certainly.

Q. And you would have time to, various times throughout the shift to have a cup of coffee, wouldn't you?

A. Yes, sir.

Q. And you were never told that you were not to eat your lunch during your shift, were you, Mr. Gillen?

A. Well, no, they wouldn't tell you that.

Q. In fact it was your understanding you were to take your lunch and eat it during the shift?

A. Yes, sir.

The Court: I didn't hear you.

The Witness: We carried our lunch and ate it in the plant. We couldn't leave the plant to go out any place else to get lunch.

Q. By Mr. Sanders: From your observation of the employees in the shipyard the majority of the employees brought their lunch, didn't they, Mr. Gillen?

A. Well, they had to for a long time until they put some lunch wagons around in the yard. Some of them ate off of them but plenty of them didn't because they had too far to go to get to them and took too much time to get to them and the biggest share of them carried their lunches.

Q. Were there ever occasions when you were unable to [28] bring your lunch to work with you?

A. No, sir. I live at home. I always took it with me.

Q. Did you file suit against the Cal Shipbuilding Corporation? A. Yes, sir.

(Testimony of Frank Gillen)

Q. When did you file suit, Mr. Gillen?

A. Oh, that was—I don't remember. I have already got paid anyway.

The Court: I didn't understand that, Mr. Gillen.

The Witness: I don't remember the date that I filed it.

The Court: I understand that but I didn't understand the rest of your answer. Did you mean that you settled the suit?

The Witness: Yes, they paid us—they paid me.

The Court: Then the suit is not pending now?

The Witness: No, sir.

Q. By Mr. Sanders: From your observation, from your own observation you have no idea what period of time Mr. Mills took to eat his lunch?

A. I can't say that.

Q. Your answer is you cannot?

A. I can't because I wasn't there on that shift but he had the same duties that I did and he could have et it any time during the eight hours that he was on duty. [29]

Q. But you do know from your own observation that he did bring his lunch?

A. He did carry his lunch with him, yes, sir. We had our lunch boxes setting right on the same bench when he come in and I know that.

Q. As far as you know, none of your superiors ever gave you orders that you were not to eat your lunch?

A. No, sir.

Q. During the shift? A. No, sir.

Mr. Sanders: That is all.

(Testimony of Frank Gillen)

Redirect Examination

By Mr. Bertram:

Q. Mr. Gillen, were there any occasions when you were not able to eat your lunch at all?

Mr. Sanders: I object to that as indefinite. You mean in the shipyard?

Mr. Bertram: Well, I am confining my questions, as I originally stated, to this period October 1943 to August of 1945.

Q. By Mr. Bertram: Let me further state: While you were employed on the swing shift on the steam plant?

A. No, I never worked a full shift there without eating.

Q. Were there any occasions when you were not able to [30] complete your lunch?

A. Yes, there were.

Q. How often did that happen?

A. Oh, two or three or four or five times while I was there.

Q. You stated on cross examination, Mr. Gillen, that it would be better to pick a lull period to start eating your lunch. What would there be about the work that would indicate a lull period?

A. Well, you see, they were—when those new boilers were put in those ships they all had to be—chemicals were put in them and then they had to be flushed out from our boiler out of the plant I was operating—the boiler I was operating furnished the steam to flush out all the boilers on those ships and there is a time when they are flushing them heavy and then when the valve is draining off there is a lull time in between each one of

(Testimony of Frank Gillen)

those flushes and that lasts about 48 hours while they are washing those ships out.

Q. Do you mean a lull period lasting for 48 hours?

A. No. I mean it takes that long to wash those boilers out while they are drawing heavy off from us, filling those boilers. That is when you got to change your fires all the time and then when they are flushing that out then you can ease off again on it. They have a gauge there in that plant run by electricity and that gauge shows a line right on [31] around just—not straight—you don't get it quite straight. It shows a line right around that tells just exactly what you do every minute of that 24 hours and you can tell by what they are drawing on that just exactly what you can do with your own boiler because a hand will go out and come back in according to the pressure they are drawing all the time.

Q. Mr. Gillen, was there any way for you to know, for example, that the large three-inch valves you spoke of would not be operated for a while?

A. No, no way whatever of knowing.

Q. They might be opened any time?

A. Any time, yes.

Q. Then what would you have to do, if anything?

A. Put on some more heat.

Q. What would you do in order to put on more heat?

A. Walk out around to the end and open your valves up bigger.

Q. What valves? A. The oil feed valves.

Q. That is increase the feed of oil?

A. Yes, sir.

(Testimony of Frank Gillen)

Q. What effect would opening the three-inch valves have on the water supply?

A. Pull it down pretty fast. [32]

Q. If that happened was there any danger involved?

A. (No answer.)

The Court: What do you mean by "danger"?

Mr. Bertram: Danger within the plant or to the boiler or equipment or yourself.

The Witness: You draw it down and get too low on water there would be danger. A steam boiler has got to have water in it at all times, you know.

Q. By Mr. Bertram: What would the danger be?

A. Blow up.

Q. You testified on cross examination, Mr. Gillen, that from your observation the majority of the employees in that shipyard carried their lunches with them?

A. They had to in the first part, when the yard first opened up. They had to because there was no place in that yard to eat. You had to carry your lunch.

Q. From your observation of that fact do you know whether or not there was a specific, designated time set aside for the majority of the employees to eat their lunch?

A. There was for people outside of the plant.

Q. What time was that?

A. (No answer.)

Mr. Sanders: You mean men on his shift?

Mr. Bertram: I am speaking of your shift.

A. (No answer.) [33]

Q. By Mr. Bertram: I don't mean the time of day; I mean how long a period of time was it?

A. I don't—I believe it is four hours.

(Testimony of Frank Gillen)

Mr. Bertram: Counsel and I discussed this question. Perhaps we may stipulate to it. May it be stipulated that a half hour lunch period was set aside on the schedule for each of the three shifts?

Mr. Sanders: For certain classes of the shipyard employees, your Honor, that is true. Not as to this particular class. For example, not as to guards and firemen.

Q. By Mr. Bertram: During the time you were eating your lunch, Mr. Gillen, did you have to give attention to the gauges and the valves?

A. Certainly.

Q. And other equipment? A. Yes, sir.

Q. Were you ever able to eat any lunch without giving attention to your equipment? A. No.

Mr. Bertram: That is all I have, your Honor.

Recross Examination

By Mr. Sanders:

Q. When you would be required to put on more heat as you phrase it, just what was the mechanics of that, Mr. Gillen? [34]

A. You had to open your valve up, turn more oil on, and turn more pressure on your oil pumps to furnish the fuel to put the oil into the burner.

Q. It was a matter of turning a valve with your hand, is that right? A. Yes, sir.

Q. Then you would look at the gauge and get it up to a given pressure? A. Yes, sir.

Q. How long did that operation take? Would you say 30 seconds? A. What for?

Q. Putting on more heat.

(Testimony of Frank Gillen)

A. Well, if your pressure starts dropping down you have got to go down there and turn the valves on. They were operated by hand and they were out on the furtherest end of the boiler, and you turned those on and come back and watched your gauges. If your steam was picking up a little bit too much you would cut them down a little or if it started to smoke a little you would cut them down, but you had to keep them up to a certain temperature all the time to keep your steam up where they had to have it to use on the line.

Q. Unless you turned it on too high or it was smoking all it consisted of then was turning the valve up a little bit? [35]

A. Up or down all the time. You had to regulate it by hand.

Q. And when you were eating your lunch in this office you would have to occasionally look at the gauges, is that right? A. Yes, sir.

Q. Outside of that, that is the only thing—that was your chief job of being there, to watch the gauges to see that the equipment did not blow up?

A. Yes, sir.

Q. Outside of watching the gauges when you were actually eating your lunch you didn't do any other work, did you?

A. We never did none of that. That was the same work we had for that. That was an engineer's job, the same work for eight hours.

Mr. Sanders: I have no further questions, your Honor.

Mr. Bertram: I am not quite clear as to the last answer.

(Testimony of Frank Gillen)

Redirect Examination

By Mr. Bertram:

Q. When you say "the same work"—you testified your work consisted of not only watching gauges but checking valves?

A. That was our job. That was the work we done. [36] That was our work for the whole eight-hour period—watching the valves and fire and steam. A steam engineer's job is that work and we didn't do any outside work—only watch that boiler.

Q. Did those duties claim your attention while you were eating as well as while you were not eating?

A. All the time.

Mr. Bertram: That is all.

The Court: Mr. Gillen, I understood you to testify your hours were from four to 12:30?

The Witness: Yes, sir.

The Court: Now you say you worked eight hours?

The Witness: We did. We went on at four and we was done at 12:30.

The Court: That would be eight hours and a half.

The Witness: That is the half hour that we was supposed to be paid for that we never got. Some of them did and part of them didn't because the yard people got 30 minutes off for lunch but the man on the steam plant couldn't have any time off because he had no relief man and you can't leave a boiler without a relief man.

The Court: How could you practically have a relief man?

The Witness: It would be only one way. You could do it if the company furnished a man. They would

(Testimony of Frank Gillen)

have to have a man for each shift and we didn't have any spare engineers in [37] the yard.

The Court: When he was not relieving one of the engineers he would have to stand by and do nothing, wouldn't he?

The Witness: Yes, sir, that would be the way he would have to be. If they furnished a relief on one shift he would naturally have to have one on another shift and you couldn't get a man from some other job and bring him down there and put him on and still put him back and work him on the same job again.

The Court: Well, the time a man would take to eat his lunch would depend upon the man, wouldn't it? It would depend on how much he ate and what he ate, wouldn't it?

The Witness: Yes, sir.

The Court: That would be a difficult matter also, wouldn't it, to standardize and make it uniform?

The Witness: We never did. We would go in there and work four or five hours and if we started to getting hungry we had no half hour to set down and eat as anybody else did.

The Court: It might not take a half hour?

The Witness: No; 10 or 15 minutes, but if we got hungry we could go and get a sandwich out and we had our chair right in the door of the office when we used it. Sometimes didn't never use it but you could see all the gauges and watch that right from that—from our office door and [38] we could eat a sandwich at that time if we wanted to. Nobody ever come there and told us when our lunch period was to eat or nothing. That was up to us.

(Testimony of Frank Gillen)

The Court: If you felt like taking a little nourishment you could do so?

The Witness: Certainly.

The Court: Foodstuff was available in your lunch box?

The Witness: Yes, sir.

The Court: Now, during the periods when you sat there observing the mechanism and gauges and valves and so forth what would the engineer have to do at all times?

The Witness: He had the same job all the eight hours. You would set there and watch your gauges—if your steam was dropping, the same as any boiler or any engine, they are all the same, everyone of them is the same. If your gauge starts to drop and you walk out and turn on a little more oil and you will pick it up and try to hold it as near as possible at the same pressure all the time, and if it starts crowding up a little bit, getting a little low on water—sometimes you are trading steam for water back and forth for a while until you get even up where you belong and, well, I won't mention that. I was going to say—I guess I had better not.

The Court: Say it if you have something in mind.

The Witness: If we would have had three boilers in [39] there where that one was, had two on all the time and one for a standby we could have held a nice steady steam pressure at all times, but there was only one boiler and they depended on me for steam and it had to be put up at the outfitting dock from that one plant and you had to watch it mighty close all the time.

The Court: How many of those steam boiler plants were there at the ship yard?

(Testimony of Frank Gillen)

The Witness: One.

The Court: Just one?

The Witness: Yes, sir; one.

The Court: And only three engineers?

The Witness: Three shifts, yes, one on each shift.

The Court: When Mr. Mills came on duty he was relieving you, was he?

The Witness: Yes, sir.

The Court: What time did he come on duty?

The Witness: His time started at 12:30.

The Court: You say his time started at 12:30. I asked you what time he came on duty?

The Witness: Well, any time between 12:00 and 12:30. It all depended. Sometimes he didn't always get in the yard at the same time.

The Court: In other words, the problem of the enterprise was that you wanted to go home when your time finished [40] at 12:30?

The Witness: Yes, sir.

The Court: And therefore the man who was going to take your place had to be there at 12:30?

The Witness: Yes, any time before that.

The Court: Couldn't be worked any other way?

The Witness: No; I couldn't leave until he come.

The Court: And he was required to be there when you wanted to go?

The Witness: Yes, sir.

The Court: And in order to get there he had to, unless he had some other means of conveyance, he had to use his physical abilities and senses to get there?

The Witness: You see, things were different during the war than they are now. We rode with others and

(Testimony of Frank Gillen)

others rode with us and we had a certain time to go and come and everybody tried to be on time.

The Court: Everybody cooperated. They shared the rides?

The Witness: Yes, sir.

The Court: They were not interested entirely in the commercial aspect of it, the wage? They were doing that patriotic work?

The Witness: Yes, sir.

The Court: And that was part of the incentive and [41] motive under which men worked in these activities?

The Witness: Yes, sir.

The Court: A war activity, was it not?

The Witness: Yes, sir.

The Court: So there was an entirely different situation then than would exist during peace time activities?

The Witness: Yes, sir.

The Court: Where it is all a matter of profit for everybody who engages in the work. Isn't that true, Mr. Gillen?

The Witness: I think they were more accurate then than they ever were before or since.

The Court: The profit incentive was not the entire motivation of the work?

The Witness: No.

The Court: Whether management or labor?

The Witness: No.

The Court: There was this patriotic feature that was involved, isn't that right?

The Witness: Yes, sir.

(Testimony of Frank Gillen)

The Court: Everybody was anxious to do what they could on the job to promote the national security?

The Witness: That is right.

The Court: In other words, it was a wartime activity, was it not? [42]

The Witness: Yes, sir.

The Court: These shifts that were being serviced by the steam and the heat were not ships that were to go out in trade, but they were to go out as weapons, weren't they?

The Witness: Yes, sir; they were—No, the last month or two—don't get this wrong now. They were all new ships being built and new boilers being put in them and all of that, but the last few months—I don't know, two, three, four, or five, something like that, and then they did repair some that was coming back in and going out again, but up to that they were all new ships being built.

The Court: But those that were coming back for repairs were being repaired so they could go out as weapons again?

The Witness: Yes, sir.

The Court: And not to carry trade between individuals?

The Witness: No.

The Court: Now, about your own case. You testified that you had a case against the shipbuilding company or that you had filed one, I believe?

The Witness: Yes, sir.

The Court: Did you have an attorney in that case?

(Testimony of Frank Gillen)

The Witness: Yes, sir; the man right here, the same attorney.

The Court: But you effected a settlement with the shipyard that was satisfactory to you? [43]

The Witness: Yes, sir.

The Court: Was that settlement, and I am not asking about the amount, but was that settlement based upon any specific and certain allowance for lunch time?

The Witness: Yes. I think, if I am not mistaken, that they allowed us so many hours for that length of time and paid for that much overtime. Now, wait a minute—I haven't got those figures on that but I could tell you just exactly what it amounted to.

The Court: I don't mean in money, but what did it amount to in time?

The Witness: In hours overtime—overtime hours.

The Court: So that we may get it down to the amount allowed for each shift, was it 20 minutes? If you don't remember just say so.

The Witness: I can figure that all out if you give me a pencil and paper. It will take a little while. It amounted to, about, in the neighborhood of \$1.00 a day.

The Court: What was the hourly wage that you were receiving there?

The Witness: \$1.68 an hour, but after you worked those 40 hours you run into overtime and that changes your time scale again.

The Court: Then of course in the settlement the feature of liquidated damages came into it, did it not? [44]

(Testimony of Frank Gillen)

The Witness: Yes, sir.

The Court: And attorney fees also?

The Witness: Yes, sir.

The Court: Did each of the men commence separate suits or were you all consolidated together? You all had about the same cause of action?

The Witness: They were all together as far as I know in the beginning with the exception that Mr. Mills had died during that length of time and there was nobody to put in his claim when the rest of us did put in, but—

The Court: I think that is all, Mr. Gillen.

Mr. Bertram: The court's question has opened up a new matter.

The Court: The court prefers that you gentlemen finish with your examination.

Mr. Bertram: I have a question regarding the other engineers that were employed.

The Court: I do not want it understood as a practice that when you two gentlemen finish your examination and the court take up the inquiry and develops a new lead, that that opens up the thing for you again. You may ask all the questions you want, both on direct and on cross examination, then when you have done so you have finished. I will permit it this time but I don't want that practice started here. [45]

Mr. Bertram: I don't think it is too material, whether they could have done it another way or not. The issue is what they actually did and whether the men did have a lunch hour to themselves.

The Court: You can ask the question.

(Testimony of Frank Gillen)

Redirect Examination

By Mr. Bertram:

Q. Mr. Gillen, there were other engineers employed at the plant, were there not, on all three shifts as far as you knew? A. Yes, sir.

Q. As well as you knew? A. Yes, sir.

Q. Did some of those engineers at one time or another work in the steam plant, do you know?

Mr. Sanders: I object to this as too general a question. It encompasses a large number of classifications in a shipyard. It is not definite enough for me to know what the witness' answer might indicate.

The Court: I think it should be specific as to the type of work that you are referring to.

Mr. Bertram: I think if we find that engineers did take over in the steam plant that would answer the question. I don't want to ask the witness whether there were other engineers who were qualified as steam plant engineers. He [46] may or may not know.

The Court: I understood you to answer the court's question, Mr. Gillen, with reference to that. Perhaps I did not understand you correctly.

The Witness: I didn't answer anything yet. I don't know what he wants me to say.

The Court: I am speaking of the court's question. I understood you to say there were three engineers during the 24 hours?

The Witness: Yes, sir.

The Court: That is what I understood him to say.

(Testimony of Frank Gillen)

Now, were there any others than the three that worked in this plant during that period of time?

The Witness: No, that is all.

Mr. Bertram: That is all I have.

The Court: Call your next witness.

Mr. Bertram: Call Mr. Alcott.

MELVILLE ALCOTT,

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Melville Alcott. [47]

Direct Examination

By Mr. Bertram:

Q. Mr. Alcott, were you at any time employed by the Cal Shipbuilding Corporation?

A. I was employed April, 1941, to May 8th, 1946.

Q. I am going to direct my questions and I wish you would direct your answers, Mr. Alcott, to the period from October 1943 to August 1945. During that period did you have occasion to know one Thomas C. Mills?

A. I did.

Q. Do you know in what capacity he was employed?

A. Graveyard engineer at the steam plant the majority of the time.

Q. And during that period of time in what capacity were you employed?

A. I was assistant chief inspector in charge of maintenance and utilities.

(Testimony of Melville Alcott)

Q. Did your duties involve supervision over the duties of Mr. Mills? A. Yes.

Q. And likewise over the duties of Mr. Gillen?

A. Yes, sir.

Q. And also of Mr. Sweet?

A. All utilities, Mr. Sweet also.

Q. The steam plant was classified as a utility for [48] that purpose, was it?

A. Acetylene plant, two compressor plants and one steam plant.

Q. On what shift were your duties principally performed?

A. Principally on the day shift but I was in charge of all three shifts.

Q. Did you have occasion to visit the steam plant during the shift of Mr. Mills, the graveyard shift?

A. Occasionally.

Q. Are you familiar with what his duties were?

A. Yes.

Q. Will you describe them, please?

A. His duties were to, and the duties as an engineer in the steam plant, was to fire and take care of the boiler in the way as an engineer should. Now, an engineer's duty on a boiler are to see that he has plenty of water, is to furnish sufficient steam, take care of his water softening system and his oil.

Q. Did those duties of Mr. Mills to your knowledge, require Mr. Mills' constant attention?

Mr. Sanders: I object to that as calling for a conclusion of the witness, your Honor, except on those occasions when Mr. Alcott was present.

(Testimony of Melville Alcott)

The Court: Objection overruled. [49]

Mr. Sanders: On the further ground it is hearsay.

The Court: You were his superior there, were you, Mr. Alcott?

The Witness: Yes, sir.

The Court: Overruled.

Mr. Sanders: I believe he testified he was only present occasionally on Mr. Mills' shift.

The Court: Objection overruled. Answer the question.

The Witness: What was the question?

The Court: Read the question.

(Question read.)

A. Well, the duties of an engineer, and I will say Mr. Mills performed his duties as an engineer, were to stay at his boiler or within 200 feet of his boiler and not be absent over ten minutes at any one time from his boiler and he performed those duties.

Q. By Mr. Bertram: Mr. Alcott, what would you say would be the longest period of time that Mr. Mills might leave the equipment unattended?

Mr. Sanders: That has already been asked and answered. I believe he said ten minutes.

The Court: I believe it has. That would follow as a deduction from what he just said.

Q. By Mr. Bertram: Mr. Alcott, do you know whether or not Mr. Mills was relieved for lunch—during the lunch [50] period?

A. Not to my knowledge.

(Testimony of Melville Alcott)

Q. If any provision to that effect were made it would be your duty to look after it, would it not?

A. There was a provision made for that purpose but it was never used for the simple reason that it was impossible to get a telephone installed at the steam plant on account of the shortage of instruments. Therefore, the engineer was not in communication with his relief or his possible relief. In other words, the crane department carried the engineers who were not in the utilities, and they had several steam engineers and it was possible for them to have relieved him if called for but it was impossible for him to call them.

Q. If relief had been provided it would have come to your knowledge, would it not? A. Oh, yes.

Q. Mr. Alcott, you heard the testimony of Mr. Gillen describing his duties on the swing shift?

A. Yes, sir.

Q. Based upon your knowledge and your supervision of those employees would you say those duties were identical with those performed by Mr. Mills on his graveyard shift? A. Practically, yes.

Mr. Bertram: You may cross examine. [51]

Cross Examination

By Mr. Sanders

Q. Mr. Alcott, what other utility plants were there close by the steam plant, if any?

A. I beg your pardon?

Q. What other utility plants were close by, adjacent to the steam plant, if any? A. There were none.

Q. Were there any other buildings close by?

A. Well, not within 100 feet except the restrooms.

(Testimony of Melville Alcott)

Q. Now, what was the provision or understanding, if any—strike that. Did you give any instructions to these engineers, particularly Mr. Mills, pertaining to his lunch period?

A. I think I can clarify that if you will allow me to use my own words. At the time that we started the compressor plants we run it straight through—well, take the day shift as an instance, we run from eight to 4:30 and there was some question regarding the noon hour so Mr. Keel, who had—he was the head of the department, asked if we could not shut down during the noon hour, the noon half-hour, I should say. We tried it one day and we found out it was impossible to do that, and after that time it was understood—I don't know as any order was ever issued to that effect, but it was understood among all the men in the utilities that [52] they would work straight through on the regular shifts which were, well, you know what they were.

Q. Do you recall the shift, the hours of the shift Mr. Mills worked? That is the graveyard shift?

A. Graveyard shift?

Q. 12:30 to 8:00, was it not? A. Right.

Q. And you knew that these steam engineers were taking their lunch to work with them and that they were eating their lunch during the shift, didn't you?

A. Why, certainly.

Q. And the nature of the work and the personnel you had at hand you could not schedule any set half hour to close down the plant, is that right?

A. It was impossible to close the plant down at any time during the 24 hours.

(Testimony of Melville Alcott)

Q. So it was understood the men were to eat their lunch and sometimes eat their lunch whenever they had a lull period during the shift?

A. Whenever they could.

Q. From your knowledge of the steam plant there would be lull periods, wouldn't there?

A. Well, no, I wouldn't say that. There might possibly be during some days but when steaming boilers there was a period of 48 hours at least, sometimes longer, that the boiler was pushed away beyond its capacity which required [53] ed constant attention. We installed a flow meter in the steam plant, not for the purpose of checking the engineers but for the purpose of seeing whether that one boiler would possibly carry the load that we had on it or if we would have to buy another boiler. Those charts, I believe, are on record at the present time. That is, they are in the Cal Ship records, and they will show we used at some times as high as 5,000 pounds per hour, which is about 250 per cent of capacity of that particular boiler and when running that way an engineer would be required to give it constant attention.

Q. Well, there were—you heard Mr. Gillen testify that there would be occasions when, maybe, there would be a ten-minute period where he could sit down and just watch the gauges, didn't you?

A. Well, that is possible on any boiler.

Q. And it was considered safe to leave the boiler room unattended for ten minutes, is that correct?

A. Well, the only way I could answer that question is the fact that the boiler Code of Los Angeles, the City of Los Angeles, says that a man can't leave it for over

(Testimony of Melville Alcott)

ten minutes at a time. Evidently they figure that ten minutes is allowable.

Q. What I was getting at is, it was possible to have a ten-minute period where the engineer would be devoid of any [54] duties?

A. Not at all times with that particular boiler, no.

Q. I understand that, but it would be possible during the shift to have such periods?

A. No, not necessarily. If they were steaming the boiler the boiler was under a constant load for that period of time that I mentioned and it would be impossible for an engineer to have left the boiler for more than, oh, I will say five minutes at a time. If I was operating the boiler I would figure that would be the way I would have to do and I am a steam engineer.

The Court: You mean continuously.

The Witness: Yes, continuously.

Q. By Mr. Sanders: How long have you been associated with the work of steam engineering, Mr. Alcott?

A. 35 years.

Q. And it has usually been the custom and practice where you worked that the engineers would eat right in the boiler room? A. I didn't quite understand you.

Q. It is customary in practically all plants for the engineer to eat his lunch in the boiler room?

A. Yes, sir.

Q. Now, as I understand it, your testimony is there was an oral understanding between you and the men that they [55] would eat their lunch during their shift?

A. That was my understanding.

Q. And that is all that was ever said about it?

A. Yes.

(Testimony of Melville Alcott)

Q. Do you know how near the closest telephone was to the steam plant?

A. Well, at the time the steam plant was installed I think about 500 feet. Later there was a telephone put in in another building that was built, probably 200 feet.

Q. In other words, a man could have walked over to the building and telephoned and been back in less than ten minutes, couldn't he?

A. It would have been possible for him to do that.

Q. Were there ever occasions when you had to relieve the steam engineer?

A. Me personally?

Q. Or to cause a relief to be effected?

A. No.

Q. Was Mr. Mills' work satisfactory at all times?

A. His work was satisfactory at all times.

Q. When was the steam plant put in, what year?

A. That was put in, I think, in 1943. I am not certain as to my dates on that. I haven't got any data on that at all.

Q. The compressor plant was another building, was it? [56]

A. Yes, two other buildings.

Q. Isn't it true, Mr. Mills worked in the compressor plant part of the period between October 1943 and August 1945 according to your recollection?

A. I think that he did to the best of my recollection, but I can't tell you absolutely whether that is true or not because I don't remember the dates on which the steam plant was installed.

Q. Now, you stated on direct examination that you did personally see Mr. Mills at his work on the graveyard shift several times during his employment there?

A. Did I?

Q. Yes.

(Testimony of Melville Alcott)

A. At various times.

Q. Well, just approximately how many times would you say?

A. Well, probably twice a week. As a general rule I tried to be in the plant by seven o'clock. I had the acetylene plant to take care of, the two compressor plants and the steam plant and I could make all three of them in the same day, that is on the graveyard shift, and I tried to make every one in rotation.

Q. Your observations of Mr. Mills then were toward the end of his shift, around seven o'clock in the morning?

A. Yes, unless I happened to come in during the night. [57]

Q. Did you ever observe him eating his lunch, do you recall?

A. (No answer.)

The Court: Let the record show the witness shook his head in the negative. You will have to speak up so the reporter can hear you.

Q. By Mr. Sanders: You haven't any idea from your own personal knowledge how long Mr. Mills took to eat his lunch?

A. I haven't any idea.

Mr. Sanders: No further questions.

Redirect Examination

By Mr. Bertram:

Q. Mr. Alcott, do you know what the scheduled hours were for the graveyard shift?

A. What the hours were?

Q. Yes.

A. 12:30 to 8:00.

Q. And for the graveyard employees was there any scheduled lunch period?

(Testimony of Melville Alcott)

Mr. Sanders: I object to that as too general. Are you including in that Mr. Mills and the other steam engineers?

Mr. Bertram: He testified as to what his understanding was with respect to the engineers. I am asking it generally [58] now over the entire yard.

The Witness: 4:00 to 4:30, I think was the hour of the lunch period as designated by the time department.

Q. By Mr. Bertram: Making a total, then, of seven hours scheduled work? A. That is right.

Q. And do you know how many hours of pay were provided for that work?

A. Eight hours of pay was provided for that on account of it being on the graveyard shift.

Q. Was that true during this entire period?

A. Yes, as far as I know.

Mr. Bertram: That is all.

Recross Examination

By Mr. Sanders:

Q. You testified that they were paid an extra hour on the graveyard shift. Were you in the pay department? What knowledge are you basing that on, Mr. Alcott?

A. General observation is all. I haven't any absolute knowledge of that.

Q. Just from what people told you?

A. Just from what I was told.

Mr. Sanders: No further questions.

Mr. Bertram: That is all, Mr. Alcott.

The Court: Call your next witness. [59]

Mr. Bertram: Mr. Anderson.

B. A. ANDERSON,

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: B. A. Anderson.

Direct Examination

By Mr. Bertram:

Q. Mr. Anderson, what is your business or occupation? A. I am an electrical operating engineer.

Q. Were you employed by Cal Shipbuilding Corporation? A. I was, yes, sir.

Q. Between October 1943 and August 1945?

A. Yes, sir.

Q. In what capacity?

A. As an operator, compressor operator, electric compressors.

Q. Did you during that period know Thomas C. Mills? A. Yes, sir.

Q. To your recollection did he, during that period, work in the compressor plant?

A. He worked part time in the compressor plant No. 2. I worked in compressor plant No. 1. He left compressor plant No. 2 and went to the boiler. [60]

Q. The steam plant?

A. The steam plant, yes, sir.

Q. Do you know about what time he left that compressor plant? A. I couldn't say the dates, no, sir.

Q. Were compressor plants Nos. 1 and 2 identical in operation?

A. No, they are different types of compressors. We have several different types of compressors. One is a

(Testimony of B. A. Anderson)

vertical and one is a horizontal, horizontal compressor. That was a vertical compressor that he operated.

Q. Are you familiar with its operation?

A. Of all that type, yes, I am.

Q. During what shift was that operation performed by Mr. Mills?

A. I think part of it was the day shift.

Q. Was that the shift you were on?

A. No, sir; I was on the swing.

Q. Do you know how many employees were employed on the day shift with Mr. Mills in the compressor plant No. 1?

A. One employee for each plant.

Q. And from your knowledge of the operation of compressor plant No. 1 would you describe its operation, please?

A. Well, the operation is that you have got an [61] electric compressor with a very high voltage, a voltage capable of throwing an arc in there at any time that might burn out the motor, burn out the field. Also you have got the bearings to watch. They might run hot at any time. You can't tell what moment. It only takes a minute when turning up 1,500 to 2,500 revolutions, and with the large load and the size of the compressor, 5,000 cubic-foot compressor, which is an enormous machine, and the oil had to be fed to that throughout all the whole system which, if any system got clogged, it would cause at any time that particular system to burn up and stop or destroy the motor.

Q. Was that compressor—by the way, what was it compressing?

A. Air.

Q. Did that compressor require constant attention?

A. You would have to be there because you couldn't leave the plant. That was our strict rules. We wouldn't

(Testimony of B. A. Anderson)

leave the compressor plant at any time for fear something might happen if we were not there to either put the fire out or shut off in order to see to it that it didn't ruin the machine.

Q. Who issued those rules?

A. Why, them rules come from Mr. Keel and Mr. Alcott, both from Mr. Alcott and Mr. Keel. Mr. Keel was our superintendent and Mr. Alcott was classified as installation assist- [62] ant engineer.

Q. Was there any provision made for relief for lunch periods?

A. No, it wasn't possible. I will tell you the class of men we had. At that time we didn't have men we could call upon that you could go over and leave a piece of machinery of that value with. There were men there that could come in and watch it run but if something happened they wouldn't know what to do, so we stayed at it because we simply didn't want to see the machine destroyed. It wasn't replaceable even.

Q. In the event of some contingency or emergency what was necessary to be done or what was done?

A. For instance, an oil line clogged at any time we immediately—she would run hot and you have to be there to shut it off instead of burning out the complete bearing or throwing the whole shaft down in the motor and let it drop down and burn the motor out. We had to watch the oil system on it constantly, especially on the one Mr. Mills run. That was an old-time machine taken out of a mine and it wasn't dependable. It was called a Norberg.

Q. And in the event of some contingency of that sort did you engineers make the repairs to the equipment?

(Testimony of B. A. Anderson)

A. No, sir; we were not maintenance men. We were maintenance but not classed as mechanics in that trade. [63]

Q. You would then call in a repair man?

A. If we had a breakdown, unless it was something minor like a switch, we—if a switch throwed out we would put it back in but anything of a mechanical nature they would have to bring in a machinist or pipefitter or electrician or whatever class of machine to fix it. We would shut it off immediately and contact the department we wanted to come and make the repairs.

Q. From your knowledge of the operation of Mr. Mills' machine, his compressor, what would you say would be the longest period of time that he might leave that machine unattended?

Mr. Sanders: I object to that, your Honor, as calling for a conclusion of the witness and based on no observations on the witness' part.

The Court: Overruled.

Mr. Sanders: And hearsay.

The Court: You may answer the question.

The Witness: I would like to have the question again.

The Court: Read the question, Mr. Reporter.

(Question read.)

A. We were not allowed to leave the compressor plant at any time. We had to be inside the building from the time we got there and our shift and stay there a continuous shift. The noise, you see, we go a good deal by the smell [64] and the noise in a machine shop. If there is any strange noise we notice it instantly so there was no time—you couldn't tell when a thing would occur. You might go out even for five or ten minutes and leave

(Testimony of B. A. Anderson)

it and nothing happen but you might go out another ten minutes at another time and you come back and you would have a machine completely destroyed. So, you can't say there was any time you could leave the plant and not have our mind and eyes on these machines.

Mr. Bertram: That answers my question. You may cross examine.

Cross Examination

By Mr. Sanders:

Q. How often on your shift, Mr. Anderson, would your machine break down? Several times every day?

A. Oh, no, by no means. Them machines where we operated them might go along for several days without any mishap whatsoever and then again your water system, your oil system or anything could happen several times during any one day. There was no telling what the machines would do. The machines are built sturdy. They stand up very well, but to say you are allowed to leave them, you are not for the fear of something would happen while you were gone.

Q. Was your work in—strike that. Which compressor plant did you work in? [65]

A. Worked in No. 1.

Q. At all times? A. Yes, sir.

Q. And which compressor plant did Mr. Mills work in? A. No. 2.

Q. He worked in No. 2? A. Yes, sir.

Q. Were the machines the same type?

A. No, they were not.

Q. You never worked at any time with the type of machine that was in Plant No. 2?

A. Yes, sir, I did.

(Testimony of B. A. Anderson)

Q. At Cal Ship?

A. At Cal Ship. I relieved down there several times when something happened—the graveyard man didn't show up one time. There was a wreck and another time a man was sick and I had to work 16 hours through and go down there and take care of that machine.

Q. Was that after Mr. Mills had become a steam engineer?

A. I don't—I can't recall, sir. You know them things you can't say the dates or times. I can't recall but there were, I would say, five periods that I believe I done that.

Q. You are quite sure Mr. Mills worked in the [66] compressor plant the latter part of 1940?

A. I can't recall what time the boiler went in. He went to the boiler but what date the boiler went in I wouldn't know, whether it was the first part of the year or not. You see, I worked there from 1942 to 1946—the latter part of 1946.

Q. And the provisions were the same in the compressor plant. You ate your lunch during the shift, is that right?

A. Yes, sir.

Q. Had you ever done similar work before you went to work at Cal Ship?

A. Yes, sir; I served my time as a boy in electrical engineering and then I left it for a period of time and I was in the last war operating as an engineer.

Q. How many years, approximately?

A. I will say altogether 15 years.

Q. Isn't it true that it is generally the practice of an engineer who eats his meal by his machine—strike that. Isn't it true that an engineer does eat his meals or his lunch by his machine?

(Testimony of B. A. Anderson)

A. He is in among there and around there to see that nothing can happen.

Q. And you would have lull periods in the compressor plant too, wouldn't you?

A. Why, yes, you could take your lunch and have a desk. [67] We had a desk in the compressor plant. You could take your lunch and if a noise happened you jumped up and went and attended to it. If you had to shut off the machine you shut it off, or if the oil line was clogged you would have to get right to work on it. We were running, as I stated, down there short of air all the time and the result was we were on overload—what they call overload and they didn't have enough blowers to cool the double bottoms and they opened the hoses and they were drawing on us and dragging the pressure down, and, of course, a machine isn't like a boiler. It only has a certain amount of capacity. Some machines have 1500 cubic feet and some 2500 or 3000 or 5000. That means per minute.

Q. And it was your understanding when you went to work in the compressor plant that you were to work the swing shift and to have your lunch during that shift, isn't that right?

A. During the eight hours, yes, sir.

Q. But you would have no scheduled lunch period?

A. No, we didn't have no schedule.

Mr. Sanders: No further questions.

Redirect Examination

By Mr. Bertram:

Q. Mr. Anderson, did you also work the day shift at anytime? [68]

A. I worked day shift one time for two weeks.

(Testimony of B. A. Anderson)

Q. And was that during this period?

A. Oh, yes. I relieved a man who was on the day shift.

Q. What were the hours of the day shift?

A. The day shift was eight o'clock to 4:30.

Q. Any scheduled time for lunch for the yard in general?

A. The yard in general but not in the compressor plant, the oxygen plant or the steam plant.

Q. Now, during that period that you were on the day shift how many hours of elapsed time did you work?

A. On the day shift?

Q. Yes.

A. I would say the last two weeks.

Q. I mean how many hours each day shift?

A. I worked a half hour overtime every day on the day shift.

Q. And how many hours of pay did you receive?

A. Got straight eight hours.

Q. And will you describe the situation with regard to the pay when you were on the swing shift?

A. We worked eight hours.

Mr. Sanders: I don't see that the swing shift is relevant here. I will object to any testimony on that. The plaintiff was never on the swing shift during the period [69] in issue—the deceased, rather.

The Court: When were you on the swing shift, Mr. Anderson?

The Witness: From 1942, February 2nd, 1942, until November 2nd, 1946.

The Court: That was in the compressor plant?

(Testimony of B. A. Anderson)

The Witness: Yes, No. 1, yes, sir. I am an electrical compressor operator.

The Court: I don't quite understand your testimony about working a half hour overtime and getting paid for only eight hours.

The Witness: Well, wait. Maybe I am mistaken. I might have made a mistake in my statement there. No, that was the day shift—I stayed there from eight o'clock until 4:30 in the afternoon and he was supposed to have had a half hour off for lunch, you understand, as the rest of the yard had which—the general workmen had, but they didn't get it off because they had to stay there in the plant.

The Court: When would the shift that succeeded that shift go on duty?

The Witness: 4:30.

The Court: Did you get any time or overtime for that half hour?

The Witness: Not at the time we didn't, no, sir, not that I know of. I never heard of it being so. [70]

The Court: You say "not at the time." What do you mean by that?

The Witness: I never heard of them getting any more than the straight eight hours in that plant.

The Court: How about yourself? Did you ever get any more?

The Witness: No, sir. I worked straight eight hours, straight through, but you see the swing shift was granted a half hour for working swing shift and graveyard shift was granted an hour for working graveyard. Now, that half hour would allow for the lunch hour in a general yard, but in the compressor plant and in the steam plant

(Testimony of B. A. Anderson)

and in the oxygen plant we stayed with our plant the whole period of time.

The Court: Would it have been a practical plant usage to have had a standby man to relieve the engineer?

The Witness: Well, under the circumstances, with the shortage of engineers of that type, I don't think it would. There was no relief there. There was no day off or anything like that and we worked the rotation system in there. We worked five days straight for 12 weeks and then we were off two days and then we come back on and then we worked a 12-day period without time off.

The Court: You made that arrangement between yourselves?

The Witness: No, no, that was a company rule. They put a rotation rule in there. [71]

The Court: The rotation was between the men who were working there?

The Witness: No, it was the company that set up the rotation.

The Court: Well, how could it have been a practical plant usage to have had a standby man?

The Witness: Well, if they had an extra engineer he could have relieved in one plant for luncheon. You would have to have two or three; one for the steam plant and one for each compressor plant to relieve a half hour. That would have been three men on each shift.

The Court: Three men on each shift to relieve three working men?

The Witness: To relieve three men for a half hour.

The Court: Would you pay him a day's wages or would you give him different compensation for that?

(Testimony of B. A. Anderson)

The Witness: Well, if they had a man—I will tell you the union controlled that pretty well. If a man was an electrical engineer and another man a steam engineer and another man was a crane operator, well, he was classed as that. He couldn't be taken off of this piece of machinery and put on that piece of machinery even though he was capable of operating it. They don't allow that in the unions. The unions control the job.

The Court: Was there any agreement by the unions during [72] this period with reference to that?

The Witness: No, sir.

The Court: They were not working on a union basis?

The Witness: We were working on a union basis altogether, yes, certainly.

The Court: Was there any agreement by which there was a relief at all?

The Witness: No, there never was no agreement.

The Court: If you worked on the union basis—

The Witness: But the union never—

The Court: Wait a minute.

The Witness: Excuse me, judge.

The Court: If we both talk at once no one will understand what we are saying. If there was no collective bargaining agreement then there wasn't any what you call union understanding, for relief during the period that we are talking about, was there?

The Witness: Well, we had never—we all belonged to the union and collective bargaining—I don't know just how you want me to express that. We didn't have no understanding as to us fellows working.

The Court: In any event there was no relief?

The Witness: That is correct.

(Testimony of B. A. Anderson)

The Court: Granted you?

The Witness: That is correct. [73]

The Court: I am coming back again to that question of mine, Mr. Anderson: Do you think as a practical plant usage and practice it was feasible to have had relief?

The Witness: No, I do not. I don't feel there should be.

The Court: That is all. Call your next witness.

Mr. Bertram: Mr. Hill.

FRANK V. HILL,

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Frank V. Hill.

Direct Examination

By Mr. Bertram:

Q. Mr. Hill, what is your business or occupation?

A. I am a lubrication engineer.

Q. During the period between October 1943 to August 1945 were you employed at Cal Shipbuilding Corporation?

A. Yes, sir.

Q. Continuously during that period?

A. Continuously, yes, sir.

Q. Do you know one Thomas C. Mills, employed as an engineer?

A. Tom started to work for me when he first started [74] to work in the yard.

(Testimony of Frank V. Hill)

Q. That was prior to the commencement of the period which I mentioned, is it not?

A. I don't remember the date that Tom came to work but he came to work for me as an apprentice engineer and later I transferred him over to an engineer.

Q. Where did he work when he was transferred as an engineer? A. In the compressor plant.

A. In the compressor plant.

Q. And were you familiar with the operation of the compressor plant? A. Yes, sir.

Q. Will you describe the operation of the plant in which Mr. Mills worked?

A. Well, this particular plant that he worked in was a large machine, as you have heard discussed before. I think they got it from a mine down in Arizona. As soon as that was installed I believe Tom went direct from my department over there as an operator.

Q. What did he have to do to operate that compressor?

A. Well, you have to—that type of machine you have to watch all the time. There is several things that you have to watch continuously—your oil system, your water system, and as Mr. Anderson testified a while ago, a man becomes familiar with the different sounds and noises in a [75] plant like that and can immediately tell what it is and where it is, usually. And a man has to be there continuously as long as the machine is in operation.

Q. What shift did you work on, Mr. Hill?

A. Well, I was on call 24 hours. I spent most of my time on the day shift, however. I worked—usually I would stay over one or two days a week on the swing shift for a certain number of hours or I would go home

(Testimony of Frank V. Hill)

and come back say at ten or eleven o'clock and maybe stay there until two o'clock in the morning. Some mornings I would get up at two o'clock in the morning and go over the graveyard shift. In other words, I had about 200 men under my supervision in my department and in order to see what was going on, why, it was necessary for me to be over there.

Q. What was your department?

A. I had the lubrication department. We lubricated everything in the plant.

Q. And what was the relationship between your department and these engineers?

A. During the war, at the early part of the yard, when they would need a man they would send direct to the union for a particular type of man because they were available at that time. In other words, a crane operator or compressor operator or an acetylene plant operator they could order those direct from the union and get them. However, the [76] time came that you couldn't do that and we had to train a lot of the men—the majority of the crane operators.

I looked in my books before I left down there and I counted the number of men on the swing shift that I had transferred from my department to the crane department as crane operators. That was just on the one shift. I was curious as to how many men I had transferred and I looked it up and there was 1,500 men on swing shift alone that I had transferred to crane operators. Now then, my department was more or less a clearing house for these men that came in. In other words, a man would come in to my department. He may not have had any experience in that line of work

(Testimony of Frank V. Hill)

at all. On the other hand, there were other men that came in that were qualified engineers or crane operators or various tradesmen, and I tried to direct those men into the positions that they were best qualified for because men were scarce at that time.

Q. What was your job title, Mr. Hill?

A. Lubrication engineer.

Q. And in that capacity you trained Mr. Mills during his apprenticeship, is that correct?

A. Well, Tom had the preference of training as a crane operator or going into this other line of work, compressor operator or acetylene plant.

Q. Did you observe him at work in the compressor [77] plant at any time?

A. Yes. The plant was only, just about, oh, 75 feet from my office.

Q. Did you have any supervision over him?

A. Not after he was transferred over to the compressor plant—steam plant.

Q. Did you observe the way in which he performed his duties in the compressor plant?

A. Yes. I was in there, in and out of there. I went by there every day.

Q. From your observation will you describe how he performed those duties with respect to the amount of attention he gave to the equipment and so forth?

A. Well, I never saw Tom away from the plant and I would say that he was a very conscientious worker. The only time that I ever saw him away from the plant would be to come over to my office and say, "Frank, I need a barrel of oil" or, "I need some rags," or something like that.

(Testimony of Frank V. Hill)

Q. Do you know whether or not he took time off for lunch while on duty as a compressor operator?

A. No; they ate their lunch sometime during the shift. We had no designated time for the lunch period. I have been in lots of plants where the operator would say, "Well, I have got to eat my lunch early because I have to work through the noon hour on some minor adjustment," or something in the [78] plant.

Q. I notice you called Mr. Mills Tom. Did you know him pretty well?

A. Yes; he worked for me for, I don't know—I would say about a year, I would imagine.

Q. Did you ever have occasion to try to eat lunch with him while you were there?

A. No, I didn't bring my lunch to the yard.

Q. Did you ever observe him at work on the compressor plant? A. Yes.

Q. Excuse me, on the steam plant? A. Yes.

Q. And will you describe what you know of his work on the steam plant?

A. Well, he was transferred down to the steam plant. I don't remember the dates. I know that he was there because I saw him.

Q. How often did you see him at the steam plant?

A. I would say at least once a week.

Q. That was during the graveyard shift?

A. Sometime during the graveyard shift. It could have been the first part of the shift or the last part of the shift, because I was called over there quite a bit of the time. I never knew when I would have to be called back. [79]

(Testimony of Frank V. Hill)

Q. And will you describe what you observed of the manner in which he performed his work?

The Court: I don't think there is any question about the manner in which he performed his work. The question was as to the necessity or compensability of a lunch period.

Mr. Sanders: That is the only issue.

The Court: And I am afraid this is cumulative.

Mr. Bertram: It is cumulative, your Honor. Let me ask you this, Mr. Hill.

Q. By Mr. Bertram: In your capacity as lubricating engineer in charge of some 200 employees, did you have charge of employees on all three shifts?

A. Yes, sir.

Q. And are you familiar with the hours which they were scheduled to work?

A. Yes, sir.

Q. And what hours was the graveyard schedule?

Mr. Sanders: I object to that question. He is asking now a question about the employees on the graveyard shift. It has nothing to do with the employees in the engineering department.

Mr. Bertram: I will ask a preliminary question then.

Q. By Mr. Bertram: Mr. Hill, in your capacity as supervisor over these 200 employees, were you familiar with the schedule of hours of all the employees in the yard? [80]

A. Yes, sir.

Q. Were they the same for all employees on the graveyard shift?

A. That is right.

Q. Now, what were the hours scheduled for the graveyard shift employees?

A. 12:30 to 8:00.

Q. 12:30 in the morning until eight in the morning?

A. Yes, sir.

(Testimony of Frank V. Hill)

Q. Was any time scheduled for lunch?

Mr. Sanders: Are you asking as to all employees?

Mr. Bertram: All employees in the yard.

The Witness: The lunch period was from 4:00 to 4:30.

Q. By Mr. Bertram: Making a total of how many hours scheduled for work during that shift?

A. I think it figures seven hours total.

Mr. Sanders: I will concede it is seven hours.

Q. By Mr. Bertram: Do you know how many hours of pay all employees were paid for that seven hours of work?

Mr. Sanders: I object to that as calling for hearsay testimony on this witness' part. He was never on that hourly rate and he wasn't in the payroll department.

The Court: I did not hear the last part of your objection.

Mr. Sanders: I object to that as calling for hearsay [81] testimony from this witness. According to his testimony he was never in the payroll department and he was never on an hourly rate.

Mr. Bertram: I asked the preliminary question, whether he was familiar with the schedule.

The Court: Yes, that question may be answered. Objection overruled. Read the question, Mr. Reporter.

(Question read.)

The Court: Can you answer the question yes or no?

The Witness: They were paid eight hours.

The Court: No, no, you must answer that question yes or no.

The Witness: What is the question?

The Court: Read the question.

(Testimony of Frank V. Hill)

(Question read.)

The Witness: Yes.

Q. By Mr. Bertram: Will you state how many hours of pay? A. Eight hours.

Mr. Bertram: You may cross examine.

Cross Examination

By Mr. Sanders:

Q. Just to clear something up here, Mr. Hill, you stated there was a scheduled luncheon hour for all employees in the shipyard on the graveyard shift? [82]

A. That is right.

Q. Didn't you also state as to the engineers in the steam plant and compressor plant that they had no scheduled lunch hour—they were to eat during the schedule?

A. No, I heard it discussed several times. A relief was not available to give those fellows any relief.

Q. But in your direct testimony I understood you to say they would eat sometime during their shift?

A. During their shift.

Q. You gave an example that Mr. Mills one day, as you recall, would eat lunch early because at noon he was going to have to repair something?

A. That is right.

Q. And that was when Mr. Mills was on the day shift? A. That is right.

Q. So at least as to those engineers they did not have a scheduled lunch hour? A. No, they did not.

Q. Now, were these employees, these engineers in the compressor plant and steam plant and acetylene plant, were they all union employees? A. Union?

Q. Yes. A. Yes, sir.

(Testimony of Frank V. Hill)

Q. And isn't it true the union had representatives [83] in the yard at all times? A. Yes.

Q. Now, your lubrication supervisory duties included all equipment in the shipyard, didn't it?

A. That is right.

Q. And you were thoroughly familiar with the mechanics of the steam plant operation and the compressor plant operation? A. That is right.

Q. Now, isn't it true that in both of those plants there would be lull periods—what I mean by that, a man could sit down for 10 or 15 minutes?

A. Yes, there are times in almost any plant.

Q. And from your own observation you have seen these men eating their lunch in their offices in those plants, haven't you, during the shift? A. That is right.

Q. From your knowledge how many employees did you have? A. Around 200 on the average.

Q. Do you know of any other groups of employees down [84] at the shipyard that had no scheduled lunch hour that were hourly employees?

A. In my department there were certain pieces of equipment that we had to lubricate during the lunch period. For instance, in the plate shop the bridge cranes. I had the fellows, a crew that went through there. They ate their lunch ahead of time or after. It didn't make any difference to me.

Q. They were not permitted to—well, I will withdraw that.

The Court: He said they were not permitted to eat during the scheduled lunch hour. That was the question and the witness answered "No." You mean they were not permitted to eat because it was not practical?

(Testimony of Frank V. Hill)

The Witness: That is right, we worked out that plan.

The Court: You do not mean they were forbidden to eat their lunch?

The Witness: They were not forbidden a lunch period.

Q. By Mr. Sanders: Prior to working at Cal Ship did you previously work with compressor plants or steam plants?

A. Yes; I spent five years at Boulder Dam. I have been around machinery of all types all my life.

Q. There was it the practice for the engineers to remain with their equipment during their shift?

A. That is right. [85]

Q. And eat their lunch right there?

A. Yes. In that type of employment a man doesn't leave the plant. He is not—it is just an unwritten law that he is there at all times.

Mr. Sanders: No further questions.

Mr. Bertram: That is all I have.

The Court: We will hear the rest this afternoon, gentlemen, at two o'clock.

(Whereupon, at 12:00 o'clock noon, a recess was had until two o'clock p. m. of the same day.) [86]

Los Angeles, California, Thursday, May 8, 1947, 2:00 P. M.

The Court: You may proceed, gentlemen.

Mr. Bertram: We have some exhibits to offer. I think we should do that by stipulation—the change of status, Mr. Sanders.

In making an offer of these records concerning the status of Mr. Mills, while he was employed by Cal Shipbuilding Corporation, I wish to make this statement. These documents which are stapled together, are a part of the records which it is desirable from the standpoint of, I understand the Maritime Commission, to be kept together.

A portion of these documents is not material to the case because they concern matters prior to the period involved. But in order to keep them together it has been indicated it would be preferable to offer the entire lot.

The Court: You can turn one down indicating those which ante-date the first date of the time in question in this case.

Mr. Bertram: Yes, I will do this. There is a change of rate or occupation slip numbered 17194 and bearing the date 6-24-42. I will turn that one down to indicate that everything above that change of rate occupation slip is or concerns matters involved in a period in this lawsuit.

The Court: Very well, if that is the understanding. [87]

Mr. Sanders: I have no objection to that with the one addition, your Honor, that the rates of pay and the periods prescribed in our stipulation will govern if there is any conflict between that and this record here.

The Court: Yes, certainly.

Mr. Bertram: I will agree to that. We will be bound by our stipulation. This will be offered then as Plaintiff's Exhibit 1.

The Court: Received and marked filed.

(The document referred to was marked as Plaintiff's Exhibit 1, and was received in evidence.)

Mr. Bertram: With that the plaintiff rests, your Honor.

The Court: You may proceed, Mr. Sanders.

Mr. Sanders: Call Mr. Bergemann.

RUSSELL A. BERGEMANN,

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Russell A. Bergemann.

Direct Examination

By Mr. Sanders:

Q. You are now an officer of the California Ship-building Corporation? [88] A. Yes, sir.

Q. And you have been employed by them since when?

A. Since it started, February 1941.

Q. And in what capacity were you occupied in 1943?

A. I was in charge of industrial relations.

Q. Just briefly what did that consist of?

A. All the personnel phases—hiring, labor relations, recreational facilities and all the various phases of personnel.

Q. You worked in liaison with the various unions representing the crafts and also the maritime Commission?

A. Yes. I represented the company and handled grievances with the union and contract negotiations.

Q. Were these operating engineers who worked in the steam plant and acetylene plant and compressor plants, were they represented by any union?

A. They were represented by the International Union of Operating Engineers.

(Testimony of Russell A. Bergemann)

Q. And at any time was there any point raised, in 1943 up to 1945, about the men not being properly paid for their shift, their working shift?

Mr. Bertram: To which we object on the ground it is not material or relevant to any of the issues in this case. It has been held in numerous cases that the failure to object would not bar or preclude a plaintiff from claiming [89] pay for hours which he worked and for which he was not paid.

Mr. Sanders: There are also numerous cases—I concede that is true but I think there are also cases taking the other position, but that does shed some light on the real facts in the case.

The Court: These cases are individualistic and it is the circumstances and facts of each case that are material. Objection overruled.

The Witness: No; there was never objection on the part of the union to that.

Q. By Mr. Sanders: Were you also the representative that undertook conferences and consultations with individual employees that had some objection with relation to their working arrangements?

A. Well, if there were any individual employees that came to me I would always refer them to their business agent because I wouldn't—we had a union contract and you have to—

Q. Your best recollection, did any of the operating engineers ever come to you about their working arrangement?

A. No, never.

Q. You are also an officer of the Cal Shipbuilding Corporation, Mr. Bergemann?

A. Yes.

(Testimony of Russell A. Bergemann)

Q. And you are familiar with the contracts under [90] which the corporation worked in connection with the U. S. Maritime Commission in producing ships?

A. Yes.

Q. And you were a party signatory to those contracts?

A. Well, I signed some of them as an officer or assistant secretary.

Q. And for each new type of ship that was made up did they make up a new contract?

A. Well, they would either—at least they would make an addendum to the present one if there were any changes.

Q. Provisions other than the type of ship that was going to be made and the compensation therefor were the same in all the contracts?

A. They were from the beginning which I think—I think the first one was signed in about April of 1941 and they were all the same up to March 1st, 1945, when we switched from a cost-plus fixed fee contract to a form of lump sum contract.

Q. Where are the originals of those contracts?

A. We have counterparts in our office.

Q. Where are the other copies, the other originals?

A. I imagine the Maritime Commission has them.

Q. Do you have copies of any of those contracts here?

A. I have a copy of one of them—one of the typical [91] contracts.

Mr. Bertram: If the court please, I think I should not take time now to examine this rather bulky document. If it is being offered may I reserve an objection and make a motion to strike if I later, on examination, find I feel it is immaterial?

The Court: Yes.

(Testimony of Russell A. Bergemann)

Mr. Sanders: As I understand it, though, you have no objection to the copy going into evidence rather than the original?

Mr. Bertram: No, I won't make an objection on that score.

Mr. Sanders: May I have this marked and offer it in evidence?

The Court: Received subject to the objection that may hereafter be interposed. If the objection is deemed to be well taken the ruling will be vacated and it will be sustained and the instrument excluded. It is received tentatively on the aforesaid ground and ruling.

(The document referred to was marked as Defendant's Exhibit A, and was received in evidence.)

[Defendant's Exhibit A will be found at page 135 of the Transcript of Record.]

Q. By Mr. Sanders: During the operation of the shipyard did the Maritime Commission ever exercise any acts in relation to the hiring or discharging of employees down there, Mr. Bergemann? [92]

A. Well, they had, I think under the contract, a right to, but actually I cannot recall any specific instance in which they ever told us we couldn't hire somebody or had to fire somebody.

Q. Would they ever make recommendations to you with respect to the discharge of some particular employee?

A. Well, I think on one or two occasions we did discharge employees when they asked us to, but it was very seldom. After all, we were supposed to be running the place.

(Testimony of Russell A. Bergemann)

Q. The point I wanted to bring out is that it was done although the situations were very small in number?

A. Yes, it was done.

Q. And did they have any industrial relations officers in the yard?

A. Yes. They had a man there at the last, about the last three or four years.

Q. About the "last three or four years." How far back?

A. I mean from 1942 on, I guess.

Q. And what was this function?

A. Oh, he looked after the—you see, we had to get all our rates approved by the Maritime Commission and they had various procedures that we had to follow for giving increases in rates to certain crafts and if you wanted to [93] spend any money for industrial relation matters oftentimes you would have to get the approval of the local man and then he would send it on up to Oakland to get the final approval. They had a system of up-grading welders. Each time you up-graded a welder that you were teaching how to weld you would have to get the approval of the local man.

Q. You mean the Cal Ship Company not of its own accord promote a welder to a higher wage classification without the Maritime Commission's approval, is that correct?

A. We made all the welders in the county, I think, and you take a welder, a trainee, and by the time you—before you could get him up to the journeymen's rate they had what they called an up-grading committee, I think, and this committee had to approve the up-grading and this Maritime representative was the chairman of the committee.

(Testimony of Russell A. Bergemann)

Q. Besides the industrial relations officials of the Maritime Commission, what other officials did they have in the yard?

A. Oh, they had all the—all the work was inspected by the Inspection Department and then they had a large accounting staff where all the money that we spent had to be approved by them before we would be reimbursed. There were probably four or five hundred representatives of the Maritime Commission in the yard.

Q. They would approve this accounting—this [94] accounting section would approve the requisitions for materials of Cal Ship and purchase orders?

A. Not the accounting section. They had another group that approved all the requisitions for purchases before we could purchase anything. I forget what they called them.

Q. Was the industrial relations official of the Maritime Commission also a party to negotiations with the unions in regard to working conditions?

A. Well, not for our yard individually but our union agreement was a coast-wise agreement. All the yards that had an A. F. of L. contract had the same contract and we would have coast-wise meetings and the Government and labor and management were the three parties to all the negotiations. After all, it was the Government's money so they had to approve any increases in rates before they were granted.

Mr. Sanders: These contracts, your Honor, unless counsel wishes to object, I would like a concession that this represents, as far as the elements that might be material to the issue of engaging in interstate commerce, are

(Testimony of Russell A. Bergemann)

all embodied in the exhibit so we will not have to bring all the contracts in.

The Court: Is that the point of the proffer here of Exhibit 1?

Mr. Sanders: Yes. [95]

The Court: On the issue of interstate or foreign commerce solely on that issue.

Mr. Sanders: On the issue and independent contractor and all the various phases.

The Court: There was not a separate instrument for each ship, was there, Mr. Bergemann?

The Witness: In all there were six different contracts.

The Court: But they pertained to a group?

The Witness: Each one pertained to a group of ships.

The Court: But as each ship was fabricated and assembled and launched there wasn't a separate contract for that ship?

The Witness: Oh, no. For instance, one of the contracts covered 109 ships.

The Court: This is a specimen contract of what group? Exhibit 1?

The Witness: This is a copy of one of the cost-plus fixed fee contracts that we had.

The Court: Any further examination of this witness?

Mr. Sanders: No, I have no further questions.

Mr. Bertram: Mr. Bergemann's testimony that the portion of the contract relative to the point on which this is offered is the same as, or substantially the same as, the other six. I would make no objection as to your not offering the other six or the other five or whatever they are. [96]

(Testimony of Russell A. Bergemann)

Mr. Sanders: You can examine him on that if you want.

The Court: What was the situation there, Mr. Bergemann? What change was there in the contracts except as to the specification for a certain group of ships?

The Witness: The only change, your Honor, was commencing on March 1st, 1945. Instead of building the ships on a cost-plus fixed fee basis, we built them on a lump sum basis.

The Court: But in each case the money was paid by the national treasury, was it not?

The Witness: That is right. The only difference was that after March 1st, 1945, if we said we were going to build a ship for an X amount of dollars, if we didn't build it for that amount we had to pay the difference, whereas before no matter how much it cost, the Government paid the bill.

The Court: Is there a provision in this contract, Exhibit 1, with respect to the settlement of claims made by workers that were not made during the active operation period of the California Shipbuilding Corporation?

The Witness: There isn't any specific clause of that type there. There is just a clause in here that we will be reimbursed for all wages.

The Court: In other words, that is a continuing covenant or condition of the contract? There is no time fixed for the adjustment of those claims? [97]

The Witness: Well, no. The way that is handled, your Honor, right now, our general manager is in Washington settling these contracts and there will be—finally we will end up with a more or less omnibus contract to take care of every contingent claim.

(Testimony of Russell A. Bergemann)

The Court: But the cases that are being filed here now and were not filed until relatively recently, those cases as they are settled by the courts or adjusted by the litigants, are taken up seriatim in Washington and settled, is that correct?

The Witness: They are. When we are sued our attorneys notify the Maritime Commission and they in those cases advise us to go ahead and defend it and then they reimburse us for whatever the judgment is.

The Court: You say they reimburse you?

The Witness: I mean the Maritime Commission. Of course they could refuse to reimburse us if they thought that the loss was through our negligence. In that case of course we would have to go through the arbitration procedure in the contract.

The Court: I am speaking about these so-called wage and hour cases.

The Witness: For the most part, to my knowledge, we have always been reimbursed.

The Court: In other words, the Government is paying [98] the bill?

The Witness: That is right.

The Court: Instead of this being an action by an individual against the California Shipbuilding Corporation in reality it is reaching into the public treasury of the United States?

The Witness: That is right.

The Court: For the amount of recovery plus the liquidated damages that the Fair Labor Standards Act provides, plus attorney fees and plus the costs if they are allowed?

The Witness: That is right, everything.

(Testimony of Russell A. Bergemann)

The Court: Cross examine, Mr. Bertram.

Mr. Bertram: Before beginning my cross examination we would like to enter for the record an objection to the line of questioning and answers concerning the source of payment, if any, of these claims if they are found to be justified.

Cross Examination

By Mr. Bertram:

Q. Mr. Bergemann, you stated that the United States Maritime Commission played no part actually in hiring any employee? A. That is right.

Q. Cal Shipbuilding Corporation maintained its own facilities for recruiting and putting employees on the payroll? [99] A. Yes, that is right.

Q. And those employees were all paid with checks issued by the Cal Shipbuilding Corporation as far as their wages were concerned? A. That is right.

Q. The time keeping department, the payroll department was all managed by Cal Shipbuilding Corporation?

A. That is right, we did. We managed the plant.

Q. Was the Cal Shipbuilding Corporation the lessee of the premises, the real property?

A. We are named the lessee. Of course it was all under the direction of the Maritime Commission and they have certain rights there—they had certain rights in the lease that pertained to the Maritime Commission. For instance, the—when you get a lease from the Harbor Department you cannot assign it without the consent of the Harbor Department or sublet it, and the Maritime Commission had the right to come in and throw us out and put somebody else in there under the lease.

(Testimony of Russell A. Bergemann)

Q. If it felt you were not performing your obligation under the contract? A. Yes.

Q. I don't want to pursue that further, but let me ask you if that situation is covered or touched upon in this contract that has been offered in evidence? [100]

A. Well, there is—naturally there is a cancellation clause.

Q. I mean the situation with regard to the lessee and lessor relationship between Cal Shipbuilding Corporation and the Harbor Department?

A. No, not in this contract. We had separate contracts for the construction of the yard that provided that before we could start construction we would have to submit a lease of the premises to the Maritime Commission which was acceptable to them, but that is on what we call the facilities contract rather than the ship contract.

Q. Did the defendant corporation erect the facilities there?

A. Yes, we erected them on the same basis, on a cost-plus a fixed fee contract. The fee was only a dollar but the cost was reimbursed.

Q. And the company ordered all its own raw materials?

A. No. We did just a minor amount of purchasing—that is, a small percentage of the purchasing. All the steel and all the propulsion machinery and—well, all the big structural items were bought by the Maritime Commission. We didn't have anything to do with it.

Q. And brought to the plant?

A. That is right.

Q. By whom? The corporation or the Commission? [101] A. The Commission would ship it in.

(Testimony of Russell A. Bergemann)

Q. And what materials did the corporation purchase and acquire?

A. We purchased the smaller items like—well, we purchased a number of them but, for instance, like office supplies and nuts and bolts and expendable tools. Things like that we purchased subject to the approval of the Maritime Commission. We made those purchases but these other things I am talking about they were all done away and apart from the yard. They would purchase something in Washington and we would get a copy of the purchase order and we would know it was going to come sometimes.

Q. The things you are speaking of now are they the pre-fabricated portions of the ships?

A. No, no, the steel—just the sheets, the plate steel and then some of the larger items like masts and, of course, the propulsion machinery and the big items that go in to make up the ship, because after all, we were just one yard building the same type of ship that was built in a number of other yards so they would buy for the whole bunch.

Q. We have been discussing here during this lawsuit the question of work during lunch hours by certain engineers. Did the U. S. Maritime Commission Industrial Relations representative have that situation called to his attention at any time to your knowledge? [102]

A. Not to my knowledge.

Q. Do you know whether he had anything to do with the scheduling of work for those engineers?

A. No. He didn't have anything to do with that after we were managing the plant. He couldn't tell us how to manage it or else there would have been no point in paying us a fee if they are going to tell us how to do it.

(Testimony of Russell A. Bergemann)

Q. In other words, the entire management of the plant and the supervision of employees and arrangement of their working hours was done by the corporation?

A. That is right. But always subject to the approval of the Maritime Commission. For instance, we couldn't work anybody overtime unless we got their approval.

Q. Was that approval obtained beforehand?

A. Well, it was supposed to be.

Q. As a matter of practice that was not always the case?

A. As a matter of practice it was always the case because if we didn't get the approval beforehand we would have a difficult time being reimbursed.

Q. There were occasions, were there not, though, when employees were required to work overtime and it was just not possible to obtain prior approval of the United States Maritime Commission?

A. That is right. Naturally in instances like that, [103] for instance if something broke down or there was an emergency of some kind it would have to be worked and—

Q. In those cases you would get approval subsequently, would you not?

A. Yes, sir, if we could justify it we would get reimbursed.

Q. Then the Maritime Commission's participation, if any with your hiring and firing, was confined to security purposes only, isn't that correct?

A. (No answer.)

Q. Do you understand what I mean?

A. Yes, I think I do. That is true. There are certain limitations in the contract. We couldn't hire anybody who wanted to overthrow the Government or we

couldn't hire any convicts—any convict labor. That is in the usual Governmental form contract. I guess you are familiar with it.

Q. Based upon your knowledge and experience in this personnel work during the war, could you tell us whether or not these provisions were pretty much uniform throughout all cost-plus fixed fee contracts?

A. Yes. Of course that one on overthrowing the Government, that was Public Law No. 75, or something. You had to get a prospective employee to sign an affidavit and that was the law of the land. [104]

Mr. Bertram: I have no further questions.

Redirect Examination

By Mr. Sanders:

Q. The title to all of the buildings and facilities in the shipyard was in the United States Government, was it not?

A. Every title to everything.

Q. And on the parts or supplies that the shipyard itself ordered, the contract provided the title was vested in the United States at the time they were ordered?

A. That is right; even if they weren't in the yard.

Mr. Sanders: No further questions.

The Court: Weren't a good many of the facilities acquired by the exercise of the right of eminent domain—condemnation?

The Witness: You mean the land?

The Court: Land and various walk ways and—

The Witness: Yes, we did acquire some of the fringe or, well the walk way, the ferry landing and a few things like that were condemned. The leasehold interest was condemned by the Government and then there is a provision of the Code that gives them the right to condemn machinery, which they did.

(Testimony of Russell A. Bergemann)

The Court: A certain portion of a lumber yard was acquired? [105]

The Witness: Yes. That was in connection with our taxi-landing.

The Court: You said in your direct examination that you had a union contract. What did you mean by that? I assume that was during the period involved.

The Witness: Well, on May 27th, 1941, we signed what is known as the Pacific Coast Master Agreement, which is a uniform agreement containing certain standard previously agreed to between the Government, management and labor, and also provisions that were the result of collective bargaining between management and labor which covered everybody, all of the crafts in the shipyard. There were 14 different unions signatory to the agreement.

Q. When was that first collective bargaining agreement incorporated in any contract with the Cal Shipbuilding Corporation?

The Witness: Do you mean when we first signed it?

The Court: Well, my recollection is from other cases that there was a certain period when there was no collective bargaining agreement.

The Witness: Well, that was only from the period when we started the yard, when the first pile was driven, which was about the 30th of January in 1941, until May 27th, 1941 when it was signed.

The Court: My recollection is, Mr. Sanders, that in [106] the Baker case there was a period during which these disputes were settled by the terms of a collective bargaining agreement.

(Testimony of Russell A. Bergemann)

Mr. Sanders: The witness can explain that, I believe, your Honor.

The Witness: I think my statement was a little too general. The guards agreement was not signed until maybe in 1944.

The Court: That only applied to the guards?

The Witness: Yes, sir. The office workers signed at a later date. This agreement of May 27th, 1941 that I have reference to covered the crafts in the yard.

The Court: This particular work in which Mr. Mills was engaged had been covered at all times?

The Witness: Yes; that was covered by the blanket agreement.

The Court: All the ships that were fabricated and assembled and launched during the relevant period were utilized by the Navy as weapons, were they not?

The Witness: Yes; to carry cargo to our Allies and for ourselves, and also we built some troop transports.

The Court: Well, troops are not transported ordinarily for commerce.

The Witness: No.

The Court: It was a war activity essentially? [107]

The Witness: Essentially, yes.

The Court: In other words before the war brought on the cooperative activities of the Government through its agencies, the Cal Shipbuilding Corporation was a unit, a small unit and of relatively small importance?

The Witness: Well, it didn't even exist. It was organized merely to build this yard for the Government and build the ships a little before the war started, but it was certainly done with that in mind.

(Testimony of Russell A. Bergemann)

The Court: Now, you said that the contracts similar to the instrument marked Exhibit 1, were cost-plus a fixed fee which you stated to be one dollar?

The Witness: No, the contract for the construction of the yard as distinguished from the contracts for the construction of the ships was a fee of one dollar.

The Court: But we are talking about Mr. Mills' work in the construction of ships.

The Witness: That is right—well, I brought that—that came up in one of my answers to Mr. Bertram's question regarding the lease of the land.

The Court: So in consideration of the contract there was not a fixed fee of one dollar, but a fixed fee of a specified percentage on the cost price?

The Witness: No, not percentage. They were fixed in dollars but they were a good deal more than one dollar. [108]

The Court: There would not have been any profit if it were not for that. Now, coming to the question which I think may be relevant in all of these cases, but I do not know whether it has been explored extensively enough to determine it, but the Maritime Commission was the representative of the Government that was inspecting everything that was done in the shipyard?

The Witness: That is right. Every bit of work was inspected by a Maritime Commission inspector.

The Court: Weren't most of those inspectors officers in the Navy or in some other branch of the Maritime Governmental activities?

The Witness: Yes. For instance, as you probably know, the Coast Guard has jurisdiction of the safety

(Testimony of Russell A. Bergemann)

features of ships and the Coast Guard had representatives in the yard to see that the things were built correctly according to their code. The Maritime Commission inspectors themselves, of course, were not members of any branch of the Service. They were just—they were employees of the Maritime Commission.

Of course when we built our troop transports they were delivered to the Navy by the Maritime Commission immediately upon the completion of them and as a result we had quite a staff of Naval inspectors in the yard when we were building the troop transports who inspected them.

The Court: During the progress of the work and during [109] the relevant time in this case, weren't there inspectors of the Maritime Commission and of other Governmental agencies that looked to see whether or not the question of cost was being properly regulated by the contractor?

The Witness: Yes.

The Court: In other words you could not pad your rolls with a thousand men when eight hundred men could do the job?

The Witness: That is right.

The Court: And the Maritime Commission was there to watch the labor conditions, were they not?

The Witness: That is right.

The Court: And did watch it, didn't they?

The Witness: Yes. They would complain to us if they were walking around the yard and saw something irregular. If they happened to see somebody asleep or somebody shooting craps or something they would be banging on our door wanting to know when we were going to clean the matter up.

(Testimony of Russell A. Bergemann)

The Court: Suppose too much time was taken by the employees to eat their lunch?

The Witness: Well, I was going to bring out the fact that at one time they suspended an arbitrary amount of about, in round figures, \$100,000 or so because the auditors were of the opinion that men were quitting early to eat lunch and also men were quitting early to line up at the clocks and they suspended this money. We subsequently had it restored because it was just an arbitrary suspension. That was quite [110] a problem in all the shipyards as you probably know. They were big things and it was hard to keep the men at work for the full eight hours. They would line up at the clocks to get out of work on time or they would quit to eat lunch early.

The Court: That is all the questions the court has.

Recross Examination

By Mr. Bertram:

Q. Mr. Bergemann, you mentioned the union contract. To your knowledge were all employees paid in accordance with that union contract? A. Yes, sir.

Q. That is all the employees subject to it, of course?

A. Yes. Do you mean—I don't quite get your question. We paid the rates specified in the contract. If we paid too much we wouldn't get reimbursed.

Q. I was going to ask you the next question—no employee got paid more than was specified in the contract? A. Yes.

Q. Under what circumstances?

A. Well, for instance the operating—we lost \$40,000 on the operating engineers because there was a provision in there that if the crane had a capacity of 20 tons or

(Testimony of Russell A. Bergemann)

less you paid a certain rate, and if it was in excess of 20 tons you paid a higher rate, and without our knowledge, [111] without the knowledge of the proper parties, why, the superintendent of crane operators started paying a higher rate to everybody regardless of what type of crane it was, because he had more flexibility that way and so the Maritime Commission auditors got, or, rather, the operating engineers' business agent went over to Consolidated Steel and wanted the same deal and so finally it got back to our auditors and they went out and checked it and the first thing we knew we had a \$40,000 suspension that we never got back.

Q. To your knowledge did Mr. Mills receive anything in excess of what was provided for in the contract?

A. I don't know.

Q. Do you know of any other instances other than the crane operators in which that happened?

A. Well, I used to have trouble with the Maritime Commission on interpretations. For instance, I started paying truck drivers according to the actual capacity of the truck. In other words, we had rates for so many tons and the Maritime Commission auditor decided that we had to be guided by the manufacturers' specifications. Well, when we got a truck in, of course, we would alter it so we could carry more on it and they suspended \$350,000 on that but I got it straightened out by getting Washington to see the thing my way.

Q. You got it back, in other words? [112]

A. Yes.

Q. Mr. Bergemann, when a dispute came up or a grievance was to be presented by the business manager or business representative of the union, were there em-

(Testimony of Russell A. Bergemann)

ployees beneath you through whom those grievances might be brought before they came to your attention?

A. Yes. I had—We had about four fellows working for me that took care of it from day to day, the grievances.

Q. Would they frequently take care of the grievances without bringing them to your attention?

A. Well, they gave me reports on everything so I knew what was going on.

Q. Were grievances taken up if they involved a journeyman, first with the man's superintendent?

A. Well, there wasn't any grievance procedure in the contract—the contract did not call for that, but naturally there were a lot of smaller grievances that took place out in the yard that never got—that were settled by a foreman or the superintendent and never got any further.

Q. You have a copy of the standard agreement which covered the working conditions in the Cal shipyard?

A. I haven't one with me, no.

Q. You haven't? A. No.

Mr. Bertram: Do you have one with you, Mr. Sanders? [113]

Mr. Sanders: No.

Mr. Bertram: I have one in my possession. I would like to offer it. I don't have it here at hand but before the case is closed I would like to offer that in evidence.

I have no further questions of Mr. Bergemann.

Mr. Sanders: No further questions.

The Court: That is all, Mr. Bergemann.

Mr. Sanders: Colonel Irwin, will you take the stand?

CLAIR IRWIN,

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name. .

The Witness: Clair Irwin.

Direct Examination

By Mr. Sanders:

Q. Your name is Colonel Clair Irwin?

A. Yes, sir.

Mr. Sanders: May I ask this time card be marked?

(The document referred to was marked as Defendant's Exhibit B, for identification.)

Q. By Mr. Sanders: Mr. Irwin, I show you Plaintiff's Exhibit 1 in evidence, and ask you to direct your attention to these sheets only following the one numbered 17194. Will you tell me, please, what those sheets are? [114]

A. This is a change of status notice showing where Mr. Mills had been transferred under date of, approximately October 20, 1943, from swing shift to day shift, as an operating engineer.

Q. What were these change of status notices made up for? For what purpose?

A. Well, it starts out as a hiring slip, the change of status. That is set up in, I believe, about eight or ten copies of which the various divisions throughout the organization would get a copy. Like your timekeeping department would have to have a copy. The Maritime Commission also had to have a copy of any change that was made. And naturally the payroll division had to have a copy, and personnel had a copy.

(Testimony of Clair Irwin)

Q. Did the industrial relations department of the Maritime Commission receive a copy of every one of these personnel status changes?

A. I wouldn't say the industrial relations division of the Maritime Commission. I think that went to the accounting division of the Maritime Commission. In other words, they had complete control on our manpower even to terminations. Do you want me to go on with each one of these?

Q. No, that is all. I hand you Defendant's Exhibit B, marked for identification, and ask you to describe what [115] that is, please?

A. Well, this is what we call an I.B.M. or daily time card. "I.B.M." is the International Business Machines. This shows the time that the man clocked in and also shows the time that he clocked out.

Q. Those are the times in the lower right-hand corner of the card? A. That is correct.

Q. Are these the type of card that were used at the shipyard for union employees? A. Yes.

Q. Exclusively those who were on an hourly rate?

A. Yes, sir.

Q. Now, directing your attention to the columns in the left center showing actual hours worked, allowed hours, total hours paid. Do you see that?

A. Yes, sir.

Q. What are those columns?

A. Well, those columns are filled in by the timekeeper. This is a daily time card and each day a new time card is put out for the individual worker. This first column is supposedly the actual hours worked. However, the timekeeper can only go by the time punched and that

(Testimony of Clair Irwin)

shows on graveyard shift seven hours. The next column is the allowed hours and on graveyard shift we allowed them one [116] hour, making a total in the third column of eight hours.

Q. Now, does this card show the rate of pay?

A. Yes, it does.

Q. Whereabouts is that?

A. That is on the very top line.

Q. Above where it says "rate"?

A. That is correct; about the center part of the card.

Q. What is the rate on that card?

A. On this particular card it shows \$1.53.

Q. And whose time card is that?

A. This is T. C. Mills, Badge No. 55238.

Mr. Sanders: I wish to offer Defendant's Exhibit B into evidence at this time, your Honor, with the stipulation from counsel that the other time card for the period, April 24, 1944 to November 13, 1944, will be identical as far as the entries as to rate, actual hours worked, and allowed hours, and hours credited.

Mr. Bertram: Yes, they are identical in form as far as we know and I will so stipulate.

Mr. Sanders: I offer it in evidence at this time, your Honor.

The Court: May I see it for a moment, please? It will be received and marked filed.

(The document heretofore marked as Defendant's Exhibit B, was received in evidence.) [117]

Mr. Sanders: No further questions, your Honor.

(Testimony of Clair Irwin)

Cross Examination

By Mr. Bertram:

Q. Mr. Irwin, how long were you employed at the Cal Shipbuilding Corporation in the capacity in which you described?

A. Well, I came to work in August of 1941 in the accounting division, timekeeping.

Q. Now, from October 1943 until August of 1945 was there any significant change in the manner in which employees were paid and computation of their rates?

A. Well, yes. In the early days they did not show the premium time on the I.B.M. cards.

Q. What do you mean by "premium time"?

A. Well, the day shift paid straight time, swing shift was paid ten per cent more, and the graveyard shift was paid 15 per cent more premium time. I think it was sometime in the early part of 1945 that we ballooned the rates as we called it.

Q. What do you mean by "balloon the rates"? Will you describe that?

A. Well, they took the base rate, hourly rate, and divided it by seven hours for graveyard and divided it by seven and a half hours for swing, which gave them a ballooned rate. [118]

Q. Actually those—unless there had been an up-grading of any particular employee, that employee's compensation would be the same for the same hours of work on the same shift, would it not, both before and after this change?

A. Oh, yes, his compensation would be the same. Of course there was several rate increases.

(Testimony of Clair Irwin)

Q. But ignoring rate increases the employee's rate of compensation for the hours worked which he performed, was the same before you ballooned the rate as it was after you ballooned the rate?

A. That is right. It was done for purely a book-keeping purpose—from a bookkeeping standpoint—accounting feature.

Q. Now, in addition to the ten per cent and 15 per cent premiums of which you spoke, there was also a premium in hours worked, was there not?

A. That is right.

Q. Or in hours allowed, as you called it, on your time card?

A. That is right.

Q. What was it for the graveyard shift?

A. One hour for the graveyard shift. In other words, they worked seven and got paid for eight. Supposed to work seven.

Q. That was true for all employees in the yard under [119] the I.B.M. time card system?

A. (No answer.)

Q. If you don't know say so.

A. I believe so.

Q. Was it true of Mr. Mills as far as you know?

A. Oh, yes, yes. I was trying to think of some particular classification that might not have been in that category.

Q. Was any special title or name applied to the rate upon which you added the percentage premium and the time premium?

A. I don't understand your question.

Q. Was that called a base rate, something of that sort?

(Testimony of Clair Irwin)

A. Well, the base rate was your day shift rates.

Q. And is it true that all employees on a comparable grade in the same classification on whichever shift they worked, had the same so-called base rate?

A. Surely.

Q. And then onto that base rate the swing shift employees had added this ten per cent premium and one-half hour premium, is that correct?

A. That is right.

Q. And the graveyard employees had added to that base rate the 15 per cent premium plus a one-hour premium, [120] is that right?

A. That is correct.

Q. I am going to show you on Plaintiff's Exhibit 1, change of status notice dated 12-23-43, with typing in red letters, "Shift Transfer", and ask you if you can tell from that notice what change was made in Mr. Mills' status?

A. He was transferred from the day shift as a senior engineer to the graveyard shift as a senior engineer.

Q. And what happened, if anything, to his rate of pay?

A. He got 15 per cent.

Q. I note that opposite the word "rate" and under the column "Figure 2", which I assume means the status to which he was changed, the rate is given as \$1.33, the same as it is on the shift from which he was changed?

A. That is correct.

Q. Now, what is that \$1.33 figure?

A. That figure is the base rate or was the base rate at that particular time. No matter what shift you were on as a senior engineer your rate would be \$1.33. The accounting division had to figure the ten per cent which is so indicated on the time card.

(Testimony of Clair Irwin)

Q. Next directing your attention to change of status notice dated 3-24-45 on Plaintiff's Exhibit 1, opposite the word "rate" we find the figures one dollar seventy-four and eight-tenths. Will you explain what that rate is? [121]

A. Well, on or about this date was when they changed over to what we called the balloon rate and that is the blown-up rate of \$1.33. You take that and divide it down and you come back to your day shift of \$1.33. The rate was never changed even to the date of termination. His rate probably stayed the same. I don't know whether he left—no, no.

Q. In other words, as I understand your testimony, Mr. Irwin, Mr. Mills' rate continued from the time he was changed to the graveyard shift at \$1.33 base plus 15 per cent money premium, plus one-hour time premium, or a total of \$1.74-8/10th per hour?

A. That is correct.

Q. Now, Mr. Irwin, Defendant's Exhibit B, being a sample time card, contains, as you described, an entry under "Actual Hours Worked": 7. Under "Allowed Hours": 1. Under "Total Hours Paid": 8.

A. That is right.

Q. Now, what does the 7 under "Actual Hours worked" indicate?

A. That indicates this time here.

Q. Pointing to the clock entries?

A. The clock entry showing the man came in at a certain time and left at a certain time. I would not say that this actually means the time that he worked. He might have [122] clocked in here at two minutes past twelve and maybe wandered around the yard for 20 minutes or 25 minutes.

(Testimony of Clair Irwin)

Q. As a matter of fact, this card does show that he entered—that is, he punched the time clock at two minutes past twelve midnight, does it not?

A. That is correct.

Q. And punched out at 17 minutes after eight in the morning?

A. That is correct.

The Court: That is Exhibit A?

Mr. Bertram: That is Defendant's Exhibit B.

Q. By Mr. Bertram: Now, let me ask you this question. Unless you and the payroll or timekeeping department received some specific information that that additional time, in this case a half hour before and 17 minutes after, was actually time worked, you would disregard that in making the entries of the time worked, would you not?

A. Yes. If he was authorized to any overtime it would be stamped right across the card showing authorized time.

Q. Well, the question I am asking is this: This particular time card indicates that there was a half hour before the shift started and 17 minutes after the shift ended?

A. Yes, when he clocked out. [123]

Q. When he clocked in and out respectively?

A. That is right.

Q. Now, unless you received some specific information other than simply the time card showing those punches, that he had actually performed duties during that time you would ignore that extra time outside of the scheduled shift, would you not?

A. Yes, sir.

Q. And if there being an elapsed time in the scheduled shift of seven and a half hours you would enter seven as the number of hours actually worked?

A. That is right.

(Testimony of Clair Irwin)

Q. By the way, the pencil entries showing the hours actually worked, the hours allowed and the hours paid for is put in there by the timekeeping department?

A. That is put in there by the timekeeper handling this man's card.

Q. And not by the employee himself?

A. No, no. He takes the card and clocks it in and drops it in a box and the timekeeper picks it up and at night the card goes out again with that information on there so he can clock out and then they check the card in the office.

Q. So that this particular card shows that that employee for that day was allowed the compensation which you described for seven hours' work? [124]

A. That is right.

Mr. Bertram: I think we stipulated that seven hours was allowed, seven hours actually worked and one hour allowed and eight hours paid a person on all of the time cards through this period of time.

Mr. Sanders: For the period in our stipulation.

Mr. Bertram: Yes.

Mr. Sanders: You read it into the record.

Mr. Bertram: I have no further questions.

Mr. Sanders: I have no further questions, your Honor.

The Court: Very well.

Mr. Sanders: The defendant rests.

The Court: I would like to ask the first witness a question.

Mr. Bertram: Mr. Gillen, will you come forward, please?

FRANK GILLEN,

called as a witness by and on behalf of the plaintiff, having been previously duly sworn, was recalled and testified further as follows:

The Court: Mr. Gillen, were you working in the same department as Mr. Mills? A. Yes, sir.

The Court: The date does not seem to be shown here unless I have overlooked it. Here it is. It is dated on [125] the back: July 30th, 1944.

Mr. Sanders: Your Honor, the actual date, that is the work-week date, the date of the card is in the extreme upper right-hand corner. The first numeral is the month and the second numeral is the date.

The Court: On July 24th, that would be, and I presume that is the year, 1944. Were you working there in that same area and in the same job at that time?

The Witness: Now, that is a long time for me to remember back, but I did work with him all the time after he commenced working for Cal Ship.

The Court: Let me put it this way then. Did you clock in during all of the time that you worked there?

The Witness: Yes, sir.

The Court: In and out?

The Witness: Yes, sir, all of us, yes, sir.

The Court: Where was the clock located?

The Witness: Well, when we first went there our clock was located in Area 29, at the end of the building. That is down in the middle of the yard, on the north side of the loft building, next to No. 2 compressor plant. That is where our clock was at that time.

The Court: How far would that be from the boiler room where Mr. Mills and you worked?

(Testimony of Frank Gillen)

The Witness: That is, oh, the full length of the [126] docks and then over this way. I would say more than a half a mile or about that, pretty near that. Now, I can't exactly tell you.

The Court: Approximately a half mile?

The Witness: Yes, approximately a half mile.

The Court: Approximately a half mile from the place of work to the clock during that period?

The Witness: That was in the beginning. Later we had to go to the clock at the gate which was farther. Those other clocks were removed and we had to use the clock next to the gate where we come in, which was a longer walk.

The Court: How much further would that be?

The Witness: Well, it is just kind of hard to tell. Walking in that yard takes you five minutes or so to walk it—all of that. I would say a trifle, maybe, over a half mile.

The Court: I believe the average walking speed of an average man is about three miles an hour—unimpeded walking?

The Witness: Well, I think you would have to walk pretty fast to get from the lower end of the outfitting dock up to the front gate in five or seven minutes.

The Court: That is all I wanted. Thank you.

Anything further, gentlemen?

Mr. Bertram: We would like permission to have the opportunity to introduce the union agreement. [127]

The Court: I think you can introduce that when you get it. You can stipulate to the fact it is the union agreement.

Mr. Sanders: I may have some objection to it. I don't know what relevancy it has or what the purpose of offering it is.

Mr. Bertram: As I recall, the last time I examined it it does set forth what the scheduled hours of work and the shift premium allowed and so forth.

Mr. Sanders: You have that by Mr. Irwin's testimony, counsel. It would just bear that out, wouldn't it?

Mr. Bertram: I think it would. It would also indicate whether any provision was made for payment of this extra lunch hour which we claim was worked and not paid for.

The Court: I do not think we would be justified in holding another session of this court simply to introduce that document. That would simply add to the cost of this case which is one of the features the court tries to avoid as far as it can. The public interest is a factor in these cases, as shown by the evidence. Any award made here comes from the public treasury and it is the duty of the courts to see that the public interest is safeguarded in these actions.

Just what does the contract contain that you desire to offer in this case, Mr. Bertram? [128]

Mr. Bertram: Well, some reference was made to the provision of the union contract and also reference was made on cross examination of the plaintiff's witnesses by counsel, to the effect that perhaps there is some practice or agreement concerning the working of an extra half hour or extra lunch time without being paid for it. Now, if the agreement so provides it will show the agreement and it will be the best evidence of that.

I am satisfied from any recollection of it that there is no such provision but on the contrary it provides for

payment in the manner Mr. Irwin described for these various shifts consisting of so many hours each.

The Court: What do you contend, Mr. Sanders?

Mr. Sanders: Well, our contentions in the matter are similar, your Honor. We are not trying to contend that the union waived a half hour lunch period. I do not think that would be binding on the employee in this action in any way even if it did.

The Court: Well, do you want to offer it in view of this concession or statement?

Mr. Bertram: No, I think that is all right if it will be conceded that the union contract made provision for employees working on the graveyard shift, working seven hours and receiving these shift differentials which Mr. Irwin described. [129]

Mr. Sanders: That is right.

The Court: Of course they are naturally going to argue that their witness told the truth about it. If you are not going to dispute it why do you want to supplant it with a writing here? It just accumulates the record.

Mr. Bertram: As long as Mr. Sanders concedes that I see no point in offering that exhibit.

The Court: Is there anything further?

Mr. Bertram: I think that disposes of that matter. I don't know if the record is quite clear on the period following the so-called ballooning of rates as to the number of hours which were paid for and allowed. I would like to ask Mr. Irwin two more questions on that.

The Court: Very well.

Mr. Sanders: You are calling him now as your own witness?

Mr. Bertram: No, continuing my cross examination, if I may.

The Court: It is so ordered.

CLAIR IRWIN,

called as a witness by and on behalf of the defendant, having been previously duly sworn, was recalled and testified further as follows:

Cross Examination (Resumed)

By Mr. Bertram:

Q. Mr. Irwin, in the course of familiarizing yourself [130] with Mr. Mills' time record, did you examine his time cards?

A. No. I glanced at them when you and I were over there before his Honor came in, but I didn't study them.

Mr. Sanders: I don't think that question is quite fair, your Honor. I don't think Mr. Irwin testified he familiarized himself with the time cards.

Mr. Bertram: I did not mean to be unfair. I just wanted to lay a foundation to see if Mr. Irwin knows the answer to a question. I don't think he does; so I would like then to offer the time card from the period following the ballooning of the rate. The purpose of that, your Honor, is this: To show that during that period, just as in the preceding period, Mr. Mills was paid eight hours of pay for seven hours of work on the graveyard shift.

The Court: To which period are you now referring?

Mr. Sanders: That appears in our stipulation on page 2, your Honor, the last period.

The Court: November 14th, 1944 to August 28th, 1945?

Mr. Bertram: That is right.

The Court: It is so understood.

Mr. Bertram: Perhaps counsel will stipulate to that

(Testimony of Clair Irwin)

Mr. Sanders: I will ask if counsel is willing to put in one card?

Mr. Bertram: Yes. And we will stipulate then that the information on those time cards, except as to the precise [131] clock punching, is identical. May we have this marked as Plaintiff's Exhibit 2?

The Court: That is merely an exemplar of the others with the exception that the clock times indicated are different?

Mr. Bertram: That is correct.

The Court: It is so ordered. It will be received and filed.

(The document referred to was marked as Plaintiff's Exhibit 2, and was received in evidence.)

The Court: The exhibit is an exemplar. It does not purport to represent the entire situation for the entire period. It is simply an exemplar tending to show what it does show as to the rate which was the same and all of the other factors on the card other than those that are indicated by the clocking indication.

Mr. Bertram: In this case, your Honor, we have stipulated for this later period on the employees' rate, which was one dollar seventy-four and eight-tenths cents. Now, I am offering this exhibit as an example of all other time cards during this period for the purpose of showing that now seven hours were paid for, seven hours credited to the work.

The Court: All right.

Mr. Bertram: And that is true on all time cards for [132] this period.

Mr. Sanders: No objection, your Honor.

The Court: It is received.

(Testimony of Clair Irwin)

Mr. Bertram: I have no further questions of Mr. Irwin.

Mr. Sanders: May I have a question on redirect in connection with Plaintiff's Exhibit 2?

The Court: Yes.

Redirect Examination

By Mr. Sanders:

Q. Showing you again Defendant's Exhibit B, a time card for the work week of June 1944, what is the rate of pay thereon? A. \$1.53.

Q. Now, showing you Plaintiff's Exhibit 2 in evidence, what is the rate of pay thereon?

A. \$1.74-8/10ths.

Mr. Sanders: That is all.

Mr. Bertram: We have nothing further. The plaintiff rests, your Honor.

The Court: I think perhaps we should hold a decision here in abeyance until such time as we learn what Congress is going to do with respect to the so-called Portal to Portal cases.

I do not know that that decision will have any materiality or relevancy to this case, but it may. We [133] cannot tell until we see it.

I think you gentlemen should brief the case in view of that fact rather than have another session in the courtroom.

Mr. Sanders: As I understand it, the Bill has already gone to the President.

The Court: When did the Bill go to the President, Mr. Sanders?

Mr. Sanders: It was in the newspaper last Thursday or Friday. I believe it takes a couple of days for it to

(Testimony of Clair Irwin)

be embossed and officially sealed before it goes up from Capitol Hill to the White House. It will probably be another week.

The Court: If we have the opening brief in ten days and the reply brief in another ten days, and then the closing brief in about five, that should cover all possible situations. That will be the order. And upon the filing of the last brief the cause will stand submitted for decision.

Mr. Bertram: Before you leave the bench, your Honor, may I be clear on the contents of the brief? Was it indicated by your statement you want us to touch upon the possible effect of pending legislation?

The Court: Well, yes, that is one of the principal reasons. We want to know what this Bill contains; whether [134] it has anything that throws any light on the problem in this case.

Mr. Bertram: And the remaining points in issue, such as commerce?

The Court: Yes. This question of commerce is a very narrow question. Factual matters and the question as to proper accounting should be discussed in your briefs, Mr. Bertram.

Mr. Bertram: Very well.

Mr. Sanders: Yes, your Honor.

The Court: Upon receipt of the briefs the case will stand submitted.

(Whereupon, at 3:30 o'clock p. m., the above entitled proceedings were concluded.)

[Endorsed]: Filed Oct. 27, 1947. Edmund L. Smith, Clerk. [135]

[DEFENDANT'S EXHIBIT A]

Contract No. MCc-2128

This Contract entered into as of this 17th day of January, 1942, between the United States Maritime Commission (herein called the "Commission") and California Shipbuilding Corporation, a corporation organized and existing under the laws of the State of Delaware (herein called the "Contractor").

Whereas:

1. Under the provisions of Public Law 247 (77th Congress) approved August 25, 1941, the Commission is authorized to construct in the United States, merchant vessels of such type, size and speed as it may determine to be useful for carrying on the commerce of the United States and suitable for the conversion into naval or military auxiliaries and to produce and procure parts, equipment, material and supplies for such vessels, without advertising or competitive bidding;

2. The Commission has determined that the vessels hereinafter described are of a type, size and speed which will be useful for carrying on the commerce of the United States and suitable for conversion into naval or military auxiliaries, and desires the Contractor to construct said vessels; and

3. Under dates of January 11, 1941 and April 9, 1941, the Contractor and the Commission entered into two contracts (said two contracts being herein called the "Facilities Contract") whereunder the Contractor agreed to construct for the Commission on land leased or owned by the Contractor such shipyard facilities as are provided for in said Facilities Contract; and

(Defendant's Exhibit A)

4. The Contractor is willing to construct the vessels hereinafter described at the site of said shipyard facilities in consideration of a reimbursement to it of the costs of such construction work and the payment by the Commission of a fee upon the terms and conditions hereinafter specified.

Now, Therefore, in consideration of the premises and mutual covenants, agreements, and conditions hereinafter set forth, the parties hereto agree as follows:

ARTICLE 1.

The term "Vessel" shall be deemed to include the hulls of the vessels, whether completed or uncompleted, to be constructed by the Contractor pursuant to the terms of this contract, and also all materials, vessel items and appurtenances, vessel machinery and vessel equipment used or to be used in the construction or equipment thereof.

The term "Facilities" shall be deemed to include the shipyard and facilities and all machinery, materials, items, equipment and appurtenances used or to be used in the construction or equipment thereof, but not the land on which said shipyard and facilities shall be constructed.

ARTICLE 2.

(a) The Contractor, acting as an independent Contractor, and not as agent, shall construct, launch, equip and complete ready for service, and deliver to the Commission 109 steel hulled, steam-propulsive powered, cargo-carrying vessels (herein called the "Vessels") equipped and constructed with their machinery, materials, items, equipment and appurtenances. The Contractor shall perform its obligations as set forth above at Los Angeles,

(Defendant's Exhibit A)

California, on the site of the Facilities described in the Facilities Contract, in accordance with the terms of this contract and the plans and specifications (herein called the "Plans and Specifications") which have, at or before the execution of this contract, been approved by the Commission and identified by the signatures of the parties hereto, and which are hereby made a part hereof with the same force and effect as though herein set out in full. The Contractor shall furnish all labor, materials, supplies and equipment (except materials, supplies and equipment to be furnished by the Commission) required to perform its obligations as set forth above.

(b) All general language or requirements contained in the Plans and Specifications are intended to amplify, explain and implement the requirements of this contract, but any such general language or requirements inconsistent with the provisions hereof are superseded by this contract. The Plans and Specifications are also intended to explain each other and anything shown upon the Plans and not stipulated in the Specifications, or stipulated in the Specifications and not shown upon the Plans, shall be deemed and considered as if included in both.

(c) Until the last of the Vessels shall have been completed, unless this Contract shall be terminated at an earlier date, as hereinafter provided, the Contractor, without payment of rent therefor, shall have use and possession of the Facilities owned by the Commission for the sole purpose of constructing the Vessels upon the terms and conditions hereinafter set forth, but the Commission or any of its agents or contractors shall at all times subsequent to the date of this contract have the right to

(Defendant's Exhibit A)

use the Facilities or parts thereof to the extent that such use will in the opinion of the Commission not interfere with the performance of the work hereunder.

(d) The Contractor at the expense of the Commission shall maintain and keep the Facilities and premises on which such Facilities are constructed, and all appurtenances and equipment thereof, in good order and condition for the work to be performed hereunder.

(e) The Contractor shall police the Facilities and shall use reasonable diligence to exclude all unauthorized persons therefrom and to prevent loss or injury to the Facilities or the Vessels.

(f) The Contractor shall promptly pay any rental due under any lease made by the Contractor for the premises on which the Facilities are located, or any part thereof, and shall duly and faithfully perform each and every of its obligations, undertakings, and covenants under such lease or leases. In the event that the premises on which the Facilities are located, or any part thereof, shall be owned by the Contractor, the Contractor shall pay promptly all taxes, assessments and other charges levied or assessed thereon and shall not create or permit to be created any right, including mortgages, liens, or other incumbrances, by which any person shall have any claim or interest in or to any improvement, building, structure, or equipment erected or constructed on said premises pursuant to the Facilities Contract, even though the same shall have been attached thereto and become part thereof.

(Defendant's Exhibit A)

(g) Without the prior written consent of the Commission, the Contractor shall not use the Facilities or any of the buildings, appurtenances, or equipment located on the premises described in the Facilities Contract for any purpose other than that of constructing the Vessels, and the authorized representatives of the Commission shall have access to the Facilities at all times for the purpose of determining whether the Contractor is complying with the requirements of this contract and the Facilities Contract.

ARTICLE 3.

The Commission reserves (without limitation thereof) the right to correct any errors or omissions in, and to make any changes in, deductions from, or additions to, the Plans and Specifications. However, changes shall not be made in the general dimensions and characteristics of any of the Vessels unless such changes are made with the written consent of the Contractor.

The Contractor shall not depart from the requirements of the Plans and Specifications unless such departure is approved in writing by the Commission. No changes of any nature affecting the construction, equipping and completion of any of the Vessels are to be started or made by the Contractor before such changes have been duly authorized in writing by the Commission.

ARTICLE 4.

Certain of the materials, equipment, and machinery to be used in the construction of the Vessels will be fur-

(Defendant's Exhibit A)

nished to the Contractor by the Commission. A list of such materials, equipment, and machinery is attached hereto and marked "Exhibit A," and the Contractor shall not, without the prior written consent of the Commission, purchase or agree to purchase for use in connection with the performance of the work hereunder any of the items listed on said "Exhibit A." The Contractor, at the expense of the Commission, shall adequately store and care for all such materials, equipment and machinery delivered to the site of the Facilities until they shall be incorporated in the Vessels and shall pay all transportation charges thereon which are payable upon delivery.

At any time during the course of the performance of the work hereunder, the Commission may amend said "Exhibit A" so as to add to the list of items therein contained. Within ten days from the date of receipt of a notice of such amendment, the Contractor shall notify the Commission of any items included in such amendment which the Contractor has purchased or agreed to purchase with the approval of the Commission prior to the receipt of notice of the amendment, and such amendment shall be ineffectual as to any such items. The Contractor shall thereafter follow the instructions of the Commission with respect to such items as may be effectively added to said Exhibit by such amendment, but the Contractor shall be reimbursed for any costs incurred by it in following such instructions.

(Defendant's Exhibit A)

Set forth opposite each item of material, equipment and machinery on "Exhibit A" is a list of dates furnished by the Contractor, on or before which the quantities of material and equipment and the items of machinery indicated shall be delivered by the Commission to the site of the Facilities to enable the Contractor to deliver the Vessels in accordance with the schedule of Vessel deliveries contained in Article 5 hereof. On any amendments to Exhibit A the Contractor shall furnish to the Commission the dates on which the additional material covered thereby shall be required in order to enable it to meet said schedule of Vessel deliveries.

ARTICLE 5.

The Contractor shall deliver each of the Vessels to the Commission after such Vessel has been completed ready for service, and has passed the tests as prescribed in the Specifications. Such delivery shall be made at or near the shipyard referred to in Article 2 (a) hereof, at a place alongside of a safe and accessible pier at that place, where there must be sufficient water for the Vessel always to be afloat, custom to the contrary notwithstanding, free and clear of all liens and claims of every nature, or at such other place as may be mutually agreed upon.

Unless prevented by any of the causes enumerated in Article 6 hereof, the work under this contract shall be commenced on or before February 1, 1942 and shall be prosecuted with diligence and the time thereafter within

(Defendant's Exhibit A)

which each of the Vessels is to be delivered to the Commission, unless such time is extended by conditions of "force majeure" as defined in Article 6 hereof, or under any of the other provisions hereof, is to be in accordance with the following schedule:

Commission's Hull Numbers	Contractor's Hull Numbers	Delivery Dates
631	56	October 12, 1942
632	57	October 21, 1942
633	58	November 2, 1942
634	59	November 7, 1942
635	60	November 6, 1942
636	61	November 9, 1942
637	62	November 12, 1942
638	63	November 16, 1942
639	64	November 21, 1942
640	65	November 23, 1942
641	66	November 27, 1942
642	67	December 1, 1942
643	68	December 9, 1942
644	69	December 11, 1942
645	70	December 15, 1942
646	71	December 18, 1942
647	72	December 22, 1942
648	73	December 28, 1942
649	74	December 30, 1942
650	75	December 31, 1942
651	76	January 9, 1943
652	77	January 15, 1943
653	78	January 16, 1943
654	79	January 18, 1943

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Commission's Hull Numbers	Contractor's Hull Numbers	Delivery Dates
655	80	January 20, 1943
656	81	February 1, 1943
657	82	February 8, 1943
658	83	February 15, 1943
659	84	February 17, 1943
660	85	February 20, 1943
661	86	February 22, 1943
662	87	February 27, 1943
663	88	February 27, 1943
664	89	March 1, 1943
665	90	March 6, 1943
666	91	March 11, 1943
667	92	March 13, 1943
668	93	March 15, 1943
669	94	March 19, 1943
670	95	March 26, 1943
671	96	April 5, 1943
672	97	April 10, 1943
673	98	April 12, 1943
674	99	April 15, 1943
675	100	April 17, 1943
676	101	April 24, 1943
677	102	April 24, 1943
678	103	April 29, 1943
679	104	May 3, 1943
680	105	May 6, 1943
681	106	May 8, 1943
682	107	May 10, 1943
683	108	May 15, 1943
684	109	May 24, 1943

(Defendant's Exhibit A)

Commission's Hull Numbers	Contractor's Hull Numbers	Delivery Dates
685	110	May 31, 1943
686	111	June 5, 1943
687	112	June 7, 1943
688	113	June 12, 1943
689	114	June 14, 1943
690	115	June 18, 1943
691	116	June 19, 1943
692	117	June 23, 1943
693	118	June 26, 1943
694	119	July 3, 1943
695	120	July 6, 1943
696	121	July 7, 1943
697	122	July 12, 1943
698	123	July 20, 1943
699	124	July 27, 1943
700	125	August 2, 1943
701	126	August 3, 1943
702	127	August 7, 1943
703	128	August 9, 1943
704	129	August 14, 1943
705	130	August 16, 1943
706	131	August 18, 1943
707	132	August 23, 1943
708	133	August 30, 1943
709	134	September 1, 1943
710	135	September 2, 1943
711	136	September 7, 1943
712	137	September 15, 1943
713	138	September 21, 1943
714	139	September 27, 1943

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Commission's Hull Numbers	Contractor's Hull Numbers	Delivery Dates
715	140	September 28, 1943
716	141	October 5, 1943
717	142	October 6, 1943
718	143	October 9, 1943
719	144	October 11, 1943
720	145	October 13, 1943
721	146	October 18, 1943
722	147	October 25, 1943
723	148	October 27, 1943
724	149	October 28, 1943
725	150	November 2, 1943
726	151	November 10, 1943
727	152	November 18, 1943
728	153	November 22, 1943
729	154	November 24, 1943
730	155	November 29, 1943
731	156	December 1, 1943
732	157	December 6, 1943
733	158	December 7, 1943
734	159	December 10, 1943
735	160	December 15, 1943
736	161	December 20, 1943
737	162	December 23, 1943
738	163	December 24, 1943
739	164	December 27, 1943

Provided that the Commission in its sole discretion may for any reason extend the time for delivery of the first three Vessels to be constructed hereunder and also in its sole discretion may extend the time for the delivery of

(Defendant's Exhibit A)

the balance of the Vessels or any thereof to the extent that in its judgment said Vessels will be delayed by reason of the delay in the delivery of the said first three (3) Vessels.

It is mutually agreed by and between the parties hereto that time is of the essence of this contract, and that all actions taken by the parties hereto and their agents shall be taken to the end that the performance of this contract will be fully expedited.

The Contractor may in its discretion operate the shipyard and all facilities used in the construction of the Vessels and may carry on the work of constructing the Vessels seven (7) days per week (legal holidays excepted) and such number of shifts per day as may be determined by the Contractor.

Subject to the provisions of Article 19 hereof, the rate of wages paid by the Contractor for work performed under this contract shall not, without the consent of the Commission, be in excess of those established by any stabilization or other conference held under the auspices of the National Defense Advisory Commission or other agency of the United States for the region in which the shipyard is located, or in the event that rates have not been established for such region, in excess of those which may be approved from time to time by the Commission.

ARTICLE 6.

The term "force majeure" as employed herein shall be deemed to mean all causes whatsoever (except inclement weather of the ordinary seasonable nature) not reasonably within the control of the Contractor among which

(Defendant's Exhibit A)

but not exclusive of other causes, are acts of God; war between the United States and any foreign country; civil war, riot or insurrection in the United States; requirement of, intervention by or delays caused by civil, naval or military authorities or other agencies of government; arrests and restraints of rules and people; priorities; blockades; embargoes; vandalism; sabotage; epidemics; strikes, lockouts or other industrial disturbances; earthquakes; landslides; floods, hurricanes and cyclonic storms; damage by lightning; explosions; collisions; strandings; fires; inability of the Contractor to obtain sufficient and adequate labor at wage rates approved by the Commission; shortage of materials and equipment, provided that the Contractor has ordered all necessary materials and equipment at the proper times and used reasonable effort to obtain delivery of such materials and equipment at the time and in the order required to carry on the work properly; delays of carriers by land, sea or air or delays of subcontractors, or delays in the completion of the Facilities for any causes beyond the control of the Contractor including any of those enumerated in this paragraph which delay the starting of or orderly prosecution of the Vessel construction work; or delays due to any failure on the part of the Commission to perform its obligations hereunder, including, but not limited to, failure to act within a reasonable time on subcontracts or plans and specifications prepared by the Contractor and submitted for Commission's approval or failure to furnish the working plans for the Vessels referred to in Article 12 hereof as required by the Contractor, or failure to cause the material listed in "Exhibit A" and any amendments thereof to be delivered at the site of the Facilities

(Defendant's Exhibit A)

on the dates shown in said "Exhibit A" or amendments thereof; or delays due to changes ordered by the Commission in any plans or specifications including any delay resulting from changes in the Facilities referred to in the Facilities Contract made necessary by such changes.

Written notice of any delay caused by "force majeure" and the anticipated result thereof shall, when knowledge thereof has come to the Contractor, be given promptly by the Contractor to the Commission. Within twenty (20) days after such cause of delay has ceased to exist, the Contractor shall file with the Commission a statement of the actual delay resulting from such cause. Provided such notices shall have been given the time for delivery of the Vessel or Vessels, or any following Vessel or Vessels affected by such "force majeure", shall be extended for such time as the Contractor shall have been actually delayed in the completion of such Vessel or Vessels by reason of such "force majeure". In the event that the parties are unable to agree that the cause of delay is "force majeure" or as to the extent of the resulting delay, the matter shall be referred to arbitration as hereinafter provided. The duty of submitting and going forward with the evidence before the Arbitrators shall be on the Contractor.

ARTICLE 7.

The Commission will pay or cause to be paid to the Contractor the entire cost to the Contractor of performing this contract plus a fee for which provision is hereafter made; Provided, That in no event shall the amount payable under this contract (including payments to be made by the Commission under the succeeding Articles

(Defendant's Exhibit A)

hereof) exceed \$109,000,000, unless the Commission shall determine that the cost of performing this contract plus the fees to be paid to the Contractor hereunder will be in excess of such amount and agree by notice in writing to the Contractor to pay such increased cost plus all fees as calculated upon the basis herein set forth; and provided further, that the Contractor shall not be deemed to have guaranteed that this contract can be performed and such fees paid for said amount and shall in no event be obligated to continue its performance of this contract beyond a point at which its obligations under any leases of the premises on which the Facilities provided for in the Facilities Contract shall be constructed and under any contracts for services, labor, material and supplies required for the performance of this contract plus fees payable to the Contractor earned or accrued under the provisions of this contract shall equal the unexpended portion of the amount payable by the Commission hereunder.

A. Such cost shall be determined in accordance with the rules and regulations for determining costs issued by the Commission and entitled "Regulations Prescribing the Method of Determining Profit, Adopted May 4, 1939," as amended, in so far as applicable, and (in so far as the same are not applicable) in accordance with sound accounting practice. There shall be included (but without limitation), in determining such cost, the following items:

1. The actual net cost to the Contractor (after deducting all discounts, refunds, allowances, and price adjustments which have accrued to the benefit of the Contractor) of all materials, equipment, and machinery purchased by the Contractor for the construction of the Ves-

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sels or for the maintenance or operation of the Facilities and the premises on which they are constructed during the course of the construction of the Vessels.

2. The actual cost of all labor properly chargeable to the construction and protection of the Vessels, the processing of materials for the construction thereof, and the maintenance, operation and protection of the Facilities and the premises on which they are constructed, including piece work and incentive bonuses, bonuses to shift workers, overtime pay, pay for lunch periods and for vacations if actually paid by the Contractor.

3. The salaries and wages of officers, managers, superintendents, foremen, engineers, draftsmen, supervisors, storekeepers, clerks ,and laborers and all other employees on the pay roll of the Contractor who are engaged in the maintenance, construction or protection of the Vessels or in the maintenance, operation and protection of the Facilities and the premises on which they are constructed, or in clerical or administrative work in connection with any of such activities.

4. The actual net cost to the Contractor of engineering services, plans and specifications, bills of material, estimates, etc., purchased by the Contractor and reasonable legal and accounting fees specifically approved by the Commission, and charges for clerical and administrative services rendered by others (including affiliates) provided that the incurring of such charges and the rates therefor shall have been approved by the Commission.

5. The actual cost of delivery of the Vessels and of any trials or tests which the Contractor may be required to perform prior to the acceptance of the Vessels.

(Defendant's Exhibit A)

6. Rental and other payments made by the Contractor during the period of construction of the Vessels, pursuant to the provisions of any lease approved by the Commission under the Facilities Contract.

7. Reasonable rentals or service charges for equipment, including such equipment owned by the Contractor for periods required, the equipment to be in good working order before rental periods begin. The rental or service charge for a particular piece of equipment shall not exceed the replacement value (at the beginning of the rental period) of such equipment. Whenever the aggregate rental paid for any item of equipment equals the replacement value (at the beginning of the rental period) of such item of equipment, such equipment shall become the property of the Commission.

8. The actual net cost of fuel, power, water, stationery, telephone, telegraph, reasonable traveling and transportation expense of employees, freight, express, trucking, unloading and handling costs, permits, licenses, royalties for the use of patents when authorized by the Commission or required by the design of the Vessel, Federal and State Social Security, Unemployment Compensation and other similar taxes and charges, sales and use, excise and other taxes as defined in paragraph 7.48 of said Regulation, premiums for Workmen's Compensation, public liability, fire and other insurance and bonds to the extent herein provided, and the actual net costs of reconstructing or replacing any work or Facilities destroyed or damaged and not covered by insurance.

9. Actual interest paid or accrued for payment (not in excess of rates approved by the Commission) on loans

(Defendant's Exhibit A)

from others, including affiliates, stockholders, or the parent corporation of the Contractor (subject to the provisions of Article 22 hereof), incurred solely for the purpose of performing this contract and for the period of the construction of the Vessels and for such further periods as the Commission shall approve.

10. The actual net cost of supplies, tools and equipment purchased by the Contractor and used in the construction of the Vessels or for the repair, maintenance and operation of tools and equipment during the course of construction of the Vessels and until final acceptance thereof.

11. General, administrative and operating expenses of the Contractor incurred in the performance of this Contract, not otherwise provided for herein, to the extent approved by the Commission.

12. The actual net cost to the Contractor of carrying on a training program reasonable in extent for the training of employees for the shipbuilding project, including (but not limited to) salaries of instructors, rental of training quarters, if required, cost of supplies, materials, equipment and wages to trainees.

13. State, City, and County taxes assessed against the land and improvements upon which the Vessels or any part or parts thereof are being constructed and referable to the period of construction and paid by the Contractor.

14. All proper cancellation costs and charges incurred by the Contractor when cancellations or terminations are directed and approved by the Commission.

15. The Contractor shall be reimbursed for all costs of remedying defective work or replacing materials as

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required of it by the provisions of Article 12 hereof, or elsewhere under this contract, whether the material or work shall have been furnished or supplied by the Commission or the Contractor.

B. Unless otherwise specifically provided herein, in determining cost reimbursable hereunder, there shall be excluded from such cost (i) the exclusions required by the Regulations above referred to including without limitation those set forth in paragraph 7.23 of said Regulations; provided that any expense approved by the Commission prior to the time it is incurred shall not be deemed to be excessive or unreasonable in the absence of fraud or misrepresentation of the Contractor or its employees, or unless such expenses are for materials or equipment which are used for purposes other than performing work under this contract (ii) depreciation on the Facilities; (iii) salaries or wages, in any form, knowingly paid in violation of Section 1 of Public No. 5 (77th Congress) approved February 6, 1941; and (iv) disbursements made without prior authorization of the Commission for extension or enlargement of the Facilities as described in the Facilities Contract.

C. All excess materials, tools and equipment and other items purchased by the Contractor and for which it has been reimbursed, including scrap, shall remain the property of the Commission and shall be retained and delivered to the Commission or sold for the Commission's account in such manner and at such times as the Commission may direct or approve.

(Defendant's Exhibit A)

ARTICLE 8.

In addition to reimbursing the Contractor for all its costs as provided in Article 7 hereof, the Commission shall pay the Contractor for its services a base fee in the sum of \$110,000 for each Vessel completed, delivered and accepted in accordance with the provisions of this contract. This base fee shall be increased or decreased as determined in the following subarticles, A and B to wit:

(A) If delivery of any Vessel is delayed beyond the delivery date stipulated therefor in Article 5 hereof, then the base fee payable to the Contractor under the provisions hereof with respect to said Vessel shall be decreased to cover fixed, agreed and liquidated damages (and not as a penalty) for delay in delivery of each such Vessel an amount equal to \$400 for each and every calendar day of such delay; provided that in the event the delivery date for any such Vessel shall be extended under any provision of this contract, the date for reckoning such liquidated damages shall be correspondingly extended. The exaction of such liquidated damages shall not affect any other rights or remedies of the Commission upon default by the Contractor under any other provision of this contract. If any Vessel is completed and ready for tender of delivery to the Commission prior to the delivery date stipulated therefor in Article 5 hereof, or prior to any delivery date that may exist under any extension of time pursuant to any provision hereof, then the base fee payable to the Contractor under the provisions hereof with respect to said Vessel shall be increased by an amount equal to \$400 for each and every calendar day elapsing between the date on which such

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Vessel is actually completed and ready for such tender of delivery and said delivery date.

(B) It is agreed that the estimated average number of man hours of direct and indirect labor required to complete the work to be performed hereunder by the Contractor on each of the Vessels (hereinafter called the "Estimated Average Vessel Hours") is 625,363 (exclusive of joiner works), subject to the following adjustments for each such Vessel:

(1) For authorized changes in the Plans and Specifications affecting any such Vessel, an equitable adjustment in the Estimated Average Vessel Hours for such Vessel shall be made pursuant to agreement between the parties hereto.

(2) Within ten days after the execution hereof the Contractor has filed with the Commission and the Commission has accepted as the basis for the Estimated Average Vessel Hours as hereinafter set forth a statement of the extent to which it is contemplated the performance hereof will be through outside subcontractors. If any change shall be made in the amount of work so to be performed by subcontractors as so stated, an equitable adjustment shall, pursuant to agreement between the parties hereto, be made in the Estimated Average Vessel Hours for each Vessel affected by such change.

(3) For each day by which the delivery time of any Vessel shall be extended under any of the provisions of this contract, the Estimated Average Vessel Hours for such Vessel shall be increased by an equitable adjustment pursuant to agreement between the parties hereto.

(Defendant's Exhibit A)

If the actual average number of man hours of direct and indirect labor expended by employees of the Contractor in the completion of any Vessel (hereinafter called the "Actual Average Vessel Hours") shall be less than the Estimated Average Vessel Hours for such Vessel, adjusted as aforesaid, then the fee payable with respect to such Vessel shall be increased by an amount equal to 50¢ multiplied by the difference between the Actual Average Vessel Hours and the Estimated Average Vessel Hours for such Vessel, adjusted as aforesaid; but if the Actual Average Vessel Hours shall be greater than the Estimated Average Vessel Hours for such Vessel, adjusted as aforesaid, then the fee payable with respect to such Vessel shall be decreased by an amount equal to 33-1/3¢ multiplied by the difference between the Actual Average Vessel Hours and the Estimated Average Vessel Hours for such Vessel, as so adjusted.

The total actual number of man hours of direct and indirect labor expended by employees of the Contractor in the completion of all the Vessels constructed hereunder shall be determined upon the completion of the construction of all such Vessels and such total actual number of man hours shall be divided by the number of Vessels so constructed in order to determine the Actual Average Vessel Hours for the purposes of this subarticle (B).

The term "man hours of direct and indirect labor" as used herein shall mean the actual hours worked by all employees of the Contractor except the Contractor's corporate officers, its auditor, general manager, general superintendent, superintendents and general foreman, provided, that with respect to employees compensated upon a

(Defendant's Exhibit A)

weekly or other salary basis other than those above excluded the number of hours deemed to be "actual hours worked" shall be at the rate of forty-eight hours for each week so compensated.

At the request of the Contractor, the Commission may substitute for the above set forth method of determining adjustments under this subarticle (B) any other method satisfactory to the Contractor should it at any time, in the judgment of the Commission, appear that the results of the methods prescribed in this subarticle (B) do not reflect equitably the amount to be added to or deducted from the base fee by reason of increased or decreased man hours.

The net adjusted fee as calculated under the provisions of this Article shall be subject to deductions on account of expenditures made by the Contractor which shall not be reimbursable to the Contractor as provided in Article 7 hereof, which have been reimbursed to the Contractor and which it has retained, but it is specifically covenanted and agreed that in no event shall the net fee to be paid to the Contractor for each Vessel be less than \$60,000, or more than \$140,000, after the application of all adjustments, additions, deductions, penalties, damages, credits and liabilities of whatever kind, it being further covenanted and agreed that in addition to the net fee per Vessel as herein determined the Commission shall pay the Contractor the full cost of its performance of this contract, with no exclusions or reductions from such cost other than those provided for under the provisions of paragraph B of Article 7 hereof.

(Defendant's Exhibit A)

ARTICLE 9.

(a) The Contractor agrees to keep records and books of account on a recognized cost accounting basis satisfactory to the Commission and in conformance with a condensed chart of accounts which the Commission will furnish, showing the actual cost to it of all items of labor, materials, equipment, supplies, services and other expenditures of whatever nature for which reimbursement is authorized under the provisions of this contract. Statement returns relative to expenditures shall be made as and when directed by the Commission.

(b) The Commission and its authorized representatives shall at all times be afforded proper facilities for inspection of the work and shall at all times have access to the premises, work and materials, to all books, records, correspondence, instruction, plans, drawings, receipts, vouchers and memoranda of every description of the Contractor pertaining to said work and all such books, records and other papers shall be the property of the Commission and shall be surrendered by the Contractor upon the completion of this contract and upon delivery to the Contractor of a release by the Commission, but the Contractor shall have the right to make and may retain copies thereof. Upon the completion of this contract the Commission will give the Contractor duly authenticated copies of such books, records and other papers herein mentioned, or in lieu thereof, will at all times thereafter afford the Contractor proper facilities for inspection of the same.

(c) Any duly authorized representative of the Contractor shall be accorded the privilege of examining and

(Defendant's Exhibit A)

making copies of the books, records and papers furnished by him to the Commission. All information obtained by the Commission from the Contractor's accounts and records shall be treated as confidential.

ARTICLE 10.

The Commission will make semi-monthly payments as soon as practicable after receipt of certified public voucher covering costs reimbursable to the Contractor under this contract, which have been paid by the Contractor prior to the submission of such voucher, and evidence satisfactory to the Commission of the payment by the Contractor of such costs, provided that payments shall be made more frequently and at any time upon submission by the Contractor of certified public voucher (not made the basis of prior payment), with evidence of payment, in an amount in excess of \$100,000. Any such voucher or part thereof supported by the required evidence shall be paid in any event within 10 calendar days after receipt thereof by the Commission in Washington, D. C.

ARTICLE 11.

Within 15 days after the launching of each Vessel and receipt of public voucher the Commission will pay to the Contractor the sum of \$30,000 on account of the fee payable in respect to such vessel provided for in Article 8 hereof. Within 15 days after the delivery of each Vessel and receipt of public voucher the Commission will make the Contractor a further payment in the amount of \$30,000 on account of such fee. Upon full accounting, which shall be made in any event within six months after the delivery of the last Vessel, the Commission shall pay to the Contractor all balances due it under this contract.

(Defendant's Exhibit A)

ARTICLE 12.

(a) All material and workmanship furnished by the Contractor, unless otherwise provided in the Specifications, shall be subject to inspection by inspectors of the Commission at any and all proper times during manufacture or construction at any and all places where such manufacture or construction shall be carried on.

(b) The Contractor shall at the expense of the Commission furnish promptly all reasonable facilities and materials, necessary for the Commission's representatives (including inspectors and auditors), including suitably furnished offices with light, heat, telephone, desks, drawing tables, and filing cabinets.

(c) The Commission shall prepare a full set of See Bee tracings of working plans and bills of material required for the construction of the Vessels and the Commission will furnish the same to the Contractor in accordance with a schedule of dates which will be agreed upon by the Contractor and the Commission within two weeks after the signing hereof. If any changes are made in such plans during the course of construction of the Vessels, the Contractor shall promptly furnish the Commission with new tracings showing such changes.

(d) Any working plans not supplied by the Commission shall, as they are prepared during the progress of the work, be submitted (in such numbers as may be required) to the Commission's representative at the plant, and action thereon by the Commission shall be taken as promptly as possible and in any event within seven days after submission of any such plan.

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(e) The Commission shall promptly pass all work and material conforming to the requirements of this contract, and shall promptly reject all work and material not conforming to the requirements of this contract. The Contractor, at the expense of the Commission, shall promptly correct workmanship which does not comply with the requirements of this contract by making the same comply therewith and shall promptly replace any material or equipment which does not conform to such requirements. The Contractor, at the expense of the Commission, shall promptly take all action necessary for the collection or enforcement of any claim it or the Commission may have against any subcontractor or material man for defective workmanship or equipment furnished by the Contractor, or if required by the Commission will assign such claim to the Commission and authorize the Commission to bring an action thereon at its own expense and in its own name or that of the Contractor.

(f) All inspection and tests by the Commission shall be performed in such manner as not to unnecessarily delay the work.

(g) The Contractor may, with the approval of the Commission, employ a naval architect in connection with the construction of the Vessels to perform such services as may be necessary in connection with the construction of the Vessels and may pay such architect such costs and fees as may be approved by the Commission.

ARTICLE 13.

(a) Title to all Vessels and to all materials, equipment, supplies and all other property assembled at the site of the Facilities or elsewhere for the purpose of being used

(Defendant's Exhibit A)

for the construction of the Vessels as well as title to any material, machinery, or equipment ordered for use in connection with the performance of work under this contract to the extent the Commission or the Contractor makes payment therefor, even though delivery thereof has not been made, shall vest in the Commission. These provisions as to title shall not operate to relieve the Contractor of any of its obligations under this contract.

(b) When any payment is to be made hereunder, the Commission, as a condition precedent to making such payment, may, in its discretion, require that affidavits satisfactory to it be furnished by the Contractor showing what, if any, liens or rights in rem of any kind against the Vessels or the materials or equipment on hand for use in the construction thereof have been or can be acquired for on or account of any work done, or any materials or equipment already incorporated as a part of the Vessels, or on hand for that purpose; but it is hereby further stipulated, covenanted and agreed by the Contractor, for itself and on its own account and for and on account of all persons, firms associations, or corporations furnishing labor or material for the Vessels, and this contract is upon the express condition, that no liens or rights in rem of any kind shall lie or attach upon or against the Vessels, or materials or equipment therefor, or any part thereof, or of either, for or on account of any work done upon or about such Vessels, or of any materials or equipment furnished therefor or in connection therewith, or for or on account of any other cause or thing, or of any claims or demands of any kind, except the claims of the Commission: Provided, however, that

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in case by reason of the laws of any State, the Contractor shall be unable to comply with such express condition, the Commission may waive such condition or take such other action as it may deem proper under the circumstances.

ARTICLE 14.

(a) No patented or patent-pending article or device which involves the payment of any license fee or royalty in addition to the purchase price of such article shall be purchased or supplied by the Contractor in connection with the work under this contract without the prior approval of the Commission.

(b) The Commission will pay directly all royalties, license fees or engineering fees for the introduction, construction, use or operation in any of the Vessels of all patented features, devices, apparatus, machinery or equipment which may be furnished by the Commission under the provisions of Article 4 hereof. The Contractor shall pay all other royalties, license fees, or engineering fees for the introduction or use of patented features in the Vessels whether in connection with the method of their design, materials, or their construction or their use and operation, and for the introduction and use of all devices, apparatus, methods and processes employed in connection with the equipment and fitting of each Vessel, if such fees are not paid by the Commission, but any payment so made by the Contractor shall be reimbursed to the Contractor by the Commission.

ARTICLE 15.

Each Vessel shall be built under survey of the American Bureau of Shipping and the Contractor shall allow duly

(Defendant's Exhibit A)

authorized representatives of said Bureau access to the Facilities and to the work of subcontractors and to the Vessels at any and all proper times during the performance of this contract. The Commission will pay all fees charged by said Bureau.

ARTICLE 16.

In the performance of the work covered by this contract the Contractor, subcontractors, material men, or suppliers shall use only such unmanufactured articles, materials, and supplies, as have been mined or produced in the United States, and only such manufactured articles, materials, and supplies as have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced or manufactured, as the case may be, in the United States; the foregoing provision shall not apply to such articles, materials, or supplies of the class or kind to be used or such articles, materials, or supplies from which they are manufactured as are not mined, produced, or manufactured, as the case may be, in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality, or to such articles, materials, or supplies as may be excepted by the head of the Department under the proviso of Title III, Section 3, of the Act of Congress approved March 3, 1933 (41 U. S. C. 10).

ARTICLE 17.

Wherever practicable, the Contractor shall obtain from responsible firms or individuals competent to furnish the materials or equipment, or to undertake the work involved or any part thereof, competitive bids for all materials, equipment, or services required, and shall award orders

(Defendant's Exhibit A)

therefor to the lowest satisfactory bidders; provided that as a condition precedent to the award of any order hereunder it shall obtain the approval of the Commission or its duly authorized representative and upon the approval of the Commission or its duly authorized representative the Contractor may award orders upon the basis of market or negotiated prices. There shall be no mingling of purchases covering materials or services required under this contract and those required by the Contractor for other work. The Contractor shall not make any subcontract for part of the work to be performed hereunder or place any order for materials or services calling for a payment without the prior approval of the Commission, but the Commission may prescribe conditions and limitations subject to which orders may be placed without prior approval. The Contractor may purchase any services or materials required for its performance of this contract from any company or companies associated with or affiliated with the Contractor, it being understood that the Contractor shall be entitled to pay to such companies and they shall be entitled to receive reasonable market prices for all services and materials so furnished by them, respectively, to the Contractor with the prior approval of the Commission.

ARTICLE 18.

(a) As a condition to the employment by the Contractor of any person to perform any of the work contemplated by this contract and who will be paid from any funds made available under this contract, the Contractor shall, if the Commission so directs, require such person to execute and to file an affidavit in such form as to satisfy

(Defendant's Exhibit A)

the requirements of said Public No. 5 (77th Congress), but the execution and filing of such affidavit shall be without prejudice to the right of the Commission to require such further evidence in the premises as it may deem desirable. The Contractor agrees that in the performance of work hereunder, it will not discriminate against any worker because of race, creed, color or national origin and will require all subcontractors to agree not to so discriminate against any worker. (Executive Order No. 8802, approved June 25, 1941.)

(b) The Commission may require the removal or discharge of any person employed in or about the Facilities if it is determined that the employment of such person is detrimental to the performance of the work under this contract.

ARTICLE 19.

(a) The Contractor shall not employ any person undergoing sentence of imprisonment at hard labor.

(b) The Contractor will report monthly, and will cause all subcontractors to report in like manner, within 5 days after the close of each calendar month, on forms to be furnished by the United States Department of Labor, the number of persons on their respective pay rolls, the aggregate amount of such pay rolls, the man-hours worked, and the total expenditures for materials. He shall furnish to the Department of Labor the names and addresses of all subcontractors on the work at the earliest date practicable: Provided, however, that the requirements of this paragraph shall be applicable only for work at the site of the construction project.

(Defendant's Exhibit A)

(c) The Contractor and subcontractors at the site of the construction project will comply with the provisions of Public Act No. 324, 73d Congress, approved June 13, 1934, (48 Stat. 948) and with the provisions of the regulations issued by the Secretary of Labor thereunder, entitled "Regulations Applicable to Contractors and Subcontractors on Public Building and Public Work and on Building and Work Financed in Whole or in Part by Loans or Grants from the United States," published in the Federal Register March 1, 1941.

(d) This paragraph is applicable only to the extent that the performance of this contract is subject to the Bacon-Davis Act (46 Stat. 1494). The Contractor and its subcontractors shall pay all mechanics and laborers employed on work under this contract and directly upon the site of the work, unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account, the full amounts accrued at time of payment, computed at wage rates not less than those which may be determined by the Secretary of Labor pursuant to the provisions of the Act approved March 3, 1931 (46 Stat. 1494) to be the prevailing rates for the various classes of such laborers and *machanics*; and the scale of wages to be paid shall be posted by the Contractor in a prominent and easily accessible place at the site of the work. The Commission shall have the right to withhold from the Contractor and subcontractors so much of accrued payments as may be considered necessary by the Commission to pay to laborers and mechanics employed by the Contractor or any subcontractor on the work the difference between the rates of wages required by the

(Defendant's Exhibit A)

Contract to be paid laborers and mechanics on the work and the rates of wages received by such laborers and mechanics and not refunded to the Contractor, subcontractors or their agents. The Commission will furnish the Contractor with the wage scale determined by the Secretary of Labor as aforesaid, and until such wage scale is so furnished, the Contractor shall be under no obligations under the provisions of this paragraph.

(e) This contract is subject to the provisions of the Act of June 25, 1936 (Public No. 814), entitled "An Act to provide more adequate protection to workmen and laborers on projects, buildings, constructions, improvements, and property wherever situated, belonging to the United States of America, by granting to the several States jurisdiction and authority to apply their State workmen's compensation laws on all property and premises belonging to the United States of America."

ARTICLE 20.

Until otherwise provided by law, provisions of law prohibiting more than 8 hours of labor in any one day of persons engaged upon work covered by this contract shall, in accordance with the provisions of the Act approved October 10, 1940 (Public No. 831, 76th Cong.), be suspended. The provisions of said Act approved October 10, 1940 are applicable to this contract.

ARTICLE 21.

The Contractor warrants that he has not employed any person to solicit or secure this contract upon any agreement for a commission, percentage, brokerage, or fee, contingent or otherwise. Breach of this warranty shall

(Defendant's Exhibit A)

give the Commission the right to terminate the contract, or, in its discretion to deduct from the contract price or consideration the amount of such commission, percentage, brokerage, or fee. This warranty shall not apply to commissions payable by contractors upon contracts of sales secured or made through bona fide established commercial or selling agencies maintained by the Contractor for the purpose of securing business.

ARTICLE 22.

The Contractor covenants that it will have and maintain at all times, sufficient working funds for the carrying out of its obligations hereunder, and will make prompt payment for all labor, materials, services, and other charges which are to be paid under this contract, provided that the Contractor will not be in default under this contract for failure to make such payments if such failure is due to the fact that the Commission has not paid any properly executed voucher payable under the terms of this contract within 10 days of its delivery to the Commission at Washington, D. C. The Contractor hereby agrees that for the purposes of determining costs which shall be reimbursable to it only such working funds used by it in the performance of the work under this contract and two other contracts with the Commission dated March 14, 1941 and May 1, 1941, respectively, as shall exceed the sum of \$1,400,000, shall be interest-bearing funds, it being understood and agreed, however, that such limitation upon the amount of interest-bearing funds shall be in substitution of, and not in addition to, the requirements in respect to commitments or cash loans contained in said two contracts dated March 14, 1941 and May 1, 1941, respectively.

(Defendant's Exhibit A)

ARTICLE 23.

The following shall constitute events of default under this contract:

(a) Failure of the Contractor in any respect to use due diligence in proceeding with the performance of the work required under this contract, or failure to perform any of the covenants on its part to be performed hereunder, provided that the commission in either instance shall give notice to the Contractor as to such failure and Contractor shall not within thirty days after being so notified cure such failure.

(b) The filing by the Contractor of a petition in bankruptcy or for reorganization under the Bankruptcy Act or the entry of an order upon petition against the Contractor adjudicating the Contractor a bankrupt, or the appointment of a receiver or receivers of the Contractor or any property belonging to the Contractor necessary for the performance of its obligations under this agreement.

ARTICLE 24.

(a) Upon the occurrence of any of the events of default set forth in Article 23 hereof the Commission may terminate this contract and enter upon the site of the Facilities referred to in the Facilities Contract and take possession thereof as well as of any Vessels either completed or uncompleted and any machinery, materials, fittings, equipment and supplies theretofore or thereafter delivered at the site of the Facilities to be incorporated in the construction or the equipment of the Vessels, or to be used in connection therewith, together with all plans, specifications, calculations and other records re-

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quired for the construction or equipment of the Vessels. The termination of this contract, pursuant to the provisions of this Article, shall terminate the Facilities Contract in accordance with the terms of Article 23 thereof, and in such event the rights and obligations of the parties under the Facilities Contract shall be those stipulated in said Article 23 in case of the occurrence of an event of default thereunder. Subsequent to termination under this Article the Contractor shall not have any right to use or occupy the premises on which the Facilities or any part thereof shall have been erected or constructed. In the event that such premises or any part thereof have been leased by the Contractor from third parties, the Contractor shall promptly execute an assignment of the lease or leases to said premises, which assignment shall be satisfactory in form and substance to the Commission. In the event that said premises or any part thereof are owned by the Contractor, but leased to the Commission, any permit, permission or license theretofore granted by the Commission to the Contractor to use said premises during the term of such lease shall automatically terminate upon termination of this contract hereunder, and the Commission shall have the right to use and occupy the premises as lessee of the Contractor under the terms of any lease which it may have with the Contractor.

(b) As soon as is practicable after termination of this contract pursuant to the provisions of this Article the Commission will make an audit of the Contractor's accounts and pay to him an amount equal to all costs not theretofore paid by the Commission to which the Contractor may then be entitled under the provisions of Ar-

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ticle 7 hereof. After the effective date of termination the Contractor shall receive no further payments on account of the fee provided for in Article 8 hereof and all rights of the Contractor to receive any such payments shall cease and determine except that the contractor shall be entitled to such payments on account of its fee as shall have accrued by reason of launchings or deliveries of Vessels launched or delivered prior to such effective date of termination.

(c) The Commission may waive the right to terminate the contract and take possession upon default, or may exercise such right and subsequently permit the Contractor to resume the performance of this contract without prejudice to the Commission's right to take such possession at a later time for the same or any subsequent default.

ARTICLE 25.

The Commission may at any time prior to the completion of the work to be performed cancel this contract upon written notice to the Contractor. Upon the effective date of such cancellation the Contractor shall stop all work hereunder except as otherwise directed by the Commission. In the event of cancellation under this Article, the Contractor shall be paid all costs reimbursable under Article 7 hereof which have been incurred prior to the effective date of cancellation or which are incurred by him in the performance of work directed to be done by the Commission in completing partially completed vessels or which he may be required to pay or be liable for the payment of by reason of such cancellation. In the event of cancellation pursuant to this Article 25 the Commission

(Defendant's Exhibit A)

shall pay to the Contractor as compensation for its work and services under this contract the following fees:

- (i) With respect to each Vessel completed and delivered hereunder, the sum of \$110,000 per Vessel, less any payments which have been made on account of Contractor's fee respecting any such Vessel.
- (ii) With respect to each Vessel partially completed on which work has been stopped under the provisions of this Article a fee equal to \$110,000 multiplied by the percentage of work completed on such Vessels. In determining the percentage of work completed, account will be taken of materials on hand whether partially worked or not and allowance will be made for items furnished by the Commission and delivered to the Contractor.

The provisions of this Article in respect to the fee payable on cancellation shall not apply to any renewal or extensions of this Contract, such fee to be determined by negotiation in the event of any such renewal or extension.

ARTICLE 26.

In the event that during the course of the work hereunder the Facilities shall be destroyed or so damaged as to prevent work on the Vessels for an estimated period of 90 days or more, the Commission may elect to terminate this contract or have the Contractor reconstruct or repair the Facilities.

If the Commission shall elect to have the Facilities reconstructed or repaired by the Contractor the Contractor shall be paid the cost of the reconstruction or repair work.

(Defendant's Exhibit A)

If the Commission shall elect to terminate the contract the payments to be made to the Contractor shall be determined in accordance with the provisions of Article 25 hereof.

ARTICLE 27.

No member of or delegate to Congress, nor Resident Commissioner, shall be admitted to any share or part of this contract or to any benefit that may arise therefrom, except as provided in Section 116 of the Act approved March 4, 1909 (35 Stats. 1109). No member of or delegate to Congress, nor Resident Commissioner, shall be employed by the Contractor either with or without compensation as an attorney, agent, officer, or director. (Sec. 805(e), Merchant Marine Act, 1936.)

ARTICLE 28.

The Contractor may, in its discretion, and shall, if and as required by the Commission, secure fidelity and other similar bonds, workmen's compensation, public liability, and automobile liability insurance and such other insurance as may be required by the laws of the state in which the Facilities are located. The Contractor may also obtain other insurance against liabilities of the Contractor to any third person for any cause whatsoever except liabilities adequately covered by insurance provided by the Commission for benefit of itself and the Contractor. The Contractor shall also secure such other insurance as the Commission may direct or approve.

The Contractor shall have no duty to insure against risk of loss of or damage to any property of the Commission including, without limitation, the Facilities and Vessels or any part thereof unless the Commission shall, in

(Defendant's Exhibit A)

writing, direct the Contractor to insure such property, and then only to the extent and in the manner directed. The Commission hereby releases the Contractor from any liability on account of loss of or damage to any property of the Commission not covered by insurance.

All insurance required pursuant to instruction of the Commission shall at all times be maintained with companies, underwriters, or underwriting funds, in amounts and under forms of policies, satisfactory to the Commission.

The Contractor shall not be deemed to have warranted the validity or coverage of any such insurance. In the event that any of the insurance required by the Commission hereunder by reason of any act, omission, or negligence of the Contractor shall not be kept in full force and effect, the Contractor shall pay to the Commission all losses and indemnify the Commission against all claims and demands which would otherwise have been covered by such insurance.

ARTICLE 29.

In the event of any dispute or difference of opinion between the parties hereto as to any matter or thing arising out of or relating to this contract, or any provision hereof, which cannot be settled between the parties themselves (except disputes as to the occurrence of an event of default under Article 23 hereof which disputes shall not be the subject of arbitration) they shall submit the matter in dispute to arbitration by three disinterested arbitrators, each of the parties hereto to choose one arbitrator and the two so chosen to choose the third

(Defendant's Exhibit A)

arbitrator. The party desiring such arbitration shall give to the other party written notice of its desire, specifying the question or questions to be arbitrated and naming the arbitrator chosen by it.

Within a reasonable time thereafter, not exceeding twenty (20) calendar days, the other party shall give in like manner like written notice specifying any additional questions to be arbitrated and naming the arbitrator chosen by it.

If a party hereto shall fail to appoint an arbitrator within twenty (20) calendar days after the other party shall have so given such written notice of its desire to arbitrate, the party having appointed the arbitrator may thereupon request the American Arbitration Association to appoint the arbitrator for the party in default and such Association shall thereupon appoint such arbitrator. The two arbitrators thus chosen shall then select the third. In the event that the two arbitrators chosen by or for the parties hereto fail, within ten (10) calendar days, to select the third arbitrator, the third arbitrator, upon written request of either party hereto, shall be appointed by the American Arbitration Association. Should said American Association cease to exist or fail or refuse for a period of twenty (20) days to appoint an arbitrator after having been requested to do so by either party hereto, in the manner herein provided, then such party may request any judge of any United States Circuit Court of Appeals to appoint such arbitrator, which judge shall thereupon be fully authorized to make such appointment. The decision of any two of the three arbitrators thus chosen when reduced to writing and signed by them shall be final, conclusive and binding upon both parties hereto.

(Defendant's Exhibit A)

The arbitrators so appointed shall determine which party shall assume the expenses of such arbitration or the proportion of such expenses which each party shall bear; and the arbitration expenses so allocated shall be paid direct by the party or parties by which the same are directed to be paid.

In Witness Whereof, the parties hereto have executed five original counterparts of this agreement as of the day and year first above written with the intent that each of them shall have full force and effect independently of the others; but full performance of one shall be deemed full performance of all.

UNITED STATES MARITIME COMMISSION

By: E. S. LAND

Chairman

Attest:

W. C. PEEP, JR. (Seal)

Secretary

CALIFORNIA SHIPBUILDING CORPORATION

By: S. D. BECHTEL

President

Attest:

PAUL S. MARRIN (Seal)

Asst. Secretary

Approved as to Form:

WADE H. SKINNER

Assistant General Counsel

U. S. Maritime Commission

Case No. 5870. Mills vs. Calship. Deft's Exhibit.
Date 5/8/47. No. A in Evidence. Clerk, U. S. District
Court, Sou. Dist. of Calif. P. D. Hooser, Deputy Clerk.

District Court of the United States
Southern District of California
Central Division

United States of America
Southern District of California—ss:

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing is a full, true, and correct copy of Defendant's Exhibit A, filed in Case No. 5870-M Civil, Louise E. Mills, etc., Plaintiff, vs. California Shipbuilding Corporation, Defendant, on May 8, 1947, as the same appears from the original record remaining in my office.

Witness my hand and the seal of said Court, this 19th day of November, A. D. 1947.

(Seal)

EDMUND L. SMITH

Clerk

By R. B. Clifton

Deputy Clerk

[Endorsed]: No. 11794. United States Circuit Court of Appeals for the Ninth Circuit. Joshua Hendy Corporation, a corporation, Appellant, vs. Louise E. Mills, Administratrix of the Estate of Thomas C. Mills, Deceased, Appellee. Louise E. Mills, Administratrix of the Estate of Thomas C. Mills, Deceased, Appellant, vs. Joshua Hendy Corporation, a corporation, Appellee. Transcript of Record. Upon Appeals From the District Court of the United States for the Southern District of California, Central Division.

Filed November 21, 1947.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for
the Ninth Circuit

In the Circuit Court of Appeals for the United States
in and for the Ninth Circuit

No. 11794

JOSHUA HENDY CORPORATION, a corporation,
Appellant,

vs.

LOUISE E. MILLS, et al.,

Appellee.

APPELLANT'S POINTS ON APPEAL

Appellant in the above entitled action, in compliance with Rule 19, Subdivision 6, of the Rules of Practice of the above entitled Court, herewith submits its Points on Appeal.

The District Court erred:

1. In ruling that Thomas C. Mills or the appellant were engaged in the production of goods for interstate commerce or in processes and occupations necessary to such production, within the meaning of the Fair Labor Standards Act of 1938, as amended.

2. In ruling that the activities of Thomas C. Mills during his one-half hour lunch periods were compensable activities within the meaning of the Fair Labor Standards Act of 1938, as amended.

3. In ruling that the Court had jurisdiction of appellee's claim without a finding that the lunch period activities of Thomas C. Mills were compensable by either an express provision of a written or non-written contract or by a custom or a practice within Section (2) of the Portal-to-Portal Act of 1947.

4. In ruling that the activities of Thomas C. Mills during his lunch periods were compensable within the meaning of the Fair Labor Standards Act of 1938, as amended, since the Court expressly found that said Thomas C. Mills was compensated by appellant for only activities performed during his regular shift excluding said lunch period activities.

5. In ruling that witnesses could testify as to what activities Thomas C. Mills performed during his lunch periods when it was shown they were never at any time present with Thomas C. Mills during said periods.

6. In finding that Thomas C. Mills did not eat his lunch each day during his one-half hour lunch period.

Dated: December 2, 1947.

THELEN, MARRIN, JOHNSON & BRIDGES
ROBERT H. SANDERS & SAMUEL S. GILL

Robert H. Sanders

Attorneys for Appellant

Address:

215 W. 6th Street (1004)
Los Angeles 14, California

Received copy of the within Appellant's Points on Appeal this 3 day of December, 1947. Mohr & Borstein & Perry Bertram, by Perry Bertram, Attorneys for Appellee.

[Endorsed]: Filed Dec. 5, 1947. Paul P. O'Brien,
Clerk.

[Title of Circuit Court of Appeals and Cause]

STIPULATION AND ORDER THAT PLAINTIFF'S
EXHIBIT "1" MAY BE CONSIDERED BY
COURT WITHOUT INCLUSION IN RECORD

It is stipulated and agreed by and between counsel for the respective parties to the above entitled action that because Plaintiff's Exhibit "1", the complete personnel and employment record of Thomas C. Mills, deceased, contains much matter that is not material to the issues involved in the Appeal and Cross Appeal of the above entitled case, that said Plaintiff's Exhibit "1" need not be designated for inclusion in the printed Record on Appeal if the above entitled court will so order that said exhibit will be considered in its original form without inclusion in the said printed Record on Appeal. In the event that this stipulation is not approved by the above entitled court, it is the desires of both parties to the above entitled action that said Plaintiff's Exhibit "1" be included in the printed Record on Appeal.

Dated: December 2, 1947.

THELEN, MARRIN, JOHNSON & BRIDGES
ROBERT H. SANDERS, SAMUEL S. GILL

Robert H. Sanders

Attorneys for Appellant

Address:

215 W. 6th Street (1004)
Los Angeles 14, California

MOHR & BORSTEIN & PERRY BERTRAM

Perry Bertram

Attorneys for Appellee

Address:

744 Chamber of Commerce Building
Los Angeles 15, California

It Is So Ordered.

Dated: Dec. 5, 1947.

FRANCIS A. GARRECHT
Senior United States Circuit Judge

[Endorsed]: Filed Dec. 5, 1947. Paul P. O'Brien,
Clerk.

In the Circuit Court of Appeals for the United States
in and for the Ninth Circuit

No. 11794

JOSHUA HENDY CORPORATION, a corporation,
Appellant and Cross-Appellee,

vs.

LOUISE E. MILLS

Appellee and Cross-Appellant.

CROSS-APPELLANT'S STATEMENT OF
POINTS ON APPEAL

Cross-Appellant hereby in the above entitled action, in compliance with Rule 19, Subdivision 6, of the Rules of Practice of the above entitled Court, herewith submits her Statement of Points on Cross-Appeal.

I. The Court erred in granting the motion of defendant, Joshua Hendy Corporation, made after the conclusion of the trial to file an amended answer setting up an additional affirmative defense not supported by any evidence introduced upon the trial.

II. The Court erred in finding that the omission on the part of the defendant to pay the overtime wages due was in good faith and upon reasonable ground for believing that said omission was not a violation of the Fair Labor Standards Act.

III. The Court erred in denying cross-appellant liquidated damages equal to the amount of unpaid overtime wages.

IV. The Court erred in not awarding a fee for the services of cross-appellant's attorney substantially greater than \$75.00.

Dated: December 9, 1947.

WEINSTEIN & BERTRAM

By Perry Bertram

Attorneys for Cross-Appellant

Address:

1151 South Broadway

Los Angeles 15, California

[Affidavit of Service by Mail.]

[Endorsed]: Filed Dec. 11, 1947. Paul P. O'Brien,
Clerk.

